# (20,354.)

# SUPREME COURT OF THE UNITED STATES.

## OCTOBER TERM, 1907.

## No. 92.

NORTHERN PACIFIC RAILWAY COMPANY, PLAINTIFF IN ERROR,

*vs.*

THE STATE OF MINNESOTA UPON THE RELATION OF THE CITY OF DULUTH.

IN ERROR TO THE SUPREME COURT OF THE STATE OF MINNESOTA.

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1 STATE OF MINNESOTA:

Supreme Court, April Term, A. D. 1906.

STATE OF MINNESOTA, *County of St. Louis.*

District Court, Eleventh Judicial District.

THE STATE OF MINNESOTA *ex Rel.* CITY OF DULUTH, Relator,
*vs.*
THE NORTHERN PACIFIC RAILWAY COMPANY, a Corporation, Respondent.

*Petition for Writ of Mandamus.*

To the Honorable District Court within and for the Eleventh Judicial District, St. Louis County, Minnesota:

Your petitioner and relator, the City of Duluth, respectfully shows to the court and alleges:

2 (Part First to Fourteenth, both inclusive, in Alternative writ of Mandamus are identical with petition and are set forth in the writ following):

Wherefore, your petitioner prays that a writ of mandamus issue out of this Honorable Court commanding said Northern Pacific Railway Company to immediately proceed to repair the bridge referred to in this petition in accordance with the plans and specifications hereto attached, and that said respondent use all reasonable diligence for the completion of the same, and for such other and further relief as may be consistent with the above state of facts.

THE CITY OF DULUTH,
By OSCAR MITCHELL,
*Its Attorney.*

(Exhibits A, B, attached to petition are the same as Exhibits A and B attached to alternative writ following).

(Duly Verified.)

3 STATE OF MINNESOTA, *County of St. Louis:*

District Court, Eleventh Judicial District.

THE STATE OF MINNESOTA *ex Rel.* CITY OF DULUTH, Relator,
*vs.*
THE NORTHERN PACIFIC RAILWAY COMPANY, a Corporation, Respondent.

*Writ of Mandamus.*

The State of Minnesota, to the Northern Pacific Railway Company:

Whereas, it appears to us, by the petition of City of Duluth:

First. That it is a municipal corporations duly organized and ex-

isting in the County of St. Louis, Minnesota, and as such has by its charter the care, supervision and control of the highways, streets, alleys and public grounds within the limits of the City of Duluth; and it has power given to it by its charter to compel railroad companies to lower and bridge over their tracks or construct viaducts over the same.

4 Second. That the Lake Superior & Mississippi Railroad Company was a railroad corporation incorporated and chartered under chapter 93 of the Special Laws of the Territory of Minnesota for the year 1857, and Chapter 1 of the Special Laws of the State of Minnesota for the year 1861; and by the terms of said last mentioned act and by its articles of incorporation, said Railroad Company had the right and authority to construct its railroad across any public or private road or highway within the State of Minnesota: subject, however, to the duty, obligation and liability imposed by said special act and by the law of the State of Minnesota, and by its articles of incorporation, to put and continuously maintain such road or highway in such condition or state of repair as not to impair or interfere with its free and proper use.

Third. That on March 1st, 1873, the Western Land Association deeded to The Lake Superior & Mississippi Railroad Company a strip of land two hundred (200) feet in width, extending through a portion of the city of Duluth, and extending across Lake Avenue in the city of Duluth, which had prior to that time been platted and dedicated to the public as a public street or avenue, and accepted by the public as such.

5 That at the time of the execution and delivery of such deed, the Western Land Association was the owner in fee simple of said land, except said Lake Avenue and other public streets and avenues crossed by the land described in said deed; and prior thereto said Western Land Association had dedicated certain portions of said strip of land to the public for public streets,—which dedication included what was then and is still known as Lake Avenue in the city of Duluth.

That said deed, after describing the property conveyed, contained the following provision, to-wit:

"To Have and to Hold the Same, together with the hereditaments and appurtenances thereunto belong- or in any wise appertaining to the said party of the second part, its successors and assigns, forever.

Subject, nevertheless, to the rights of the public and of the City of Duluth in and to those portions of any of the above described property that have been heretofore dedicated to public streets, avenues or alleys."

That said deed, containing said reservation in favor of the public, was accepted by The Lake Superior & Mississippi Railroad Company, and the title to said strip of land conveyed thereby; and the

6 said Lake Superior & Mississippi Railroad Company thereby admitted and acknowledged that its rights in and to said strip of land, where it crossed Lake Avenue, were then and

always should be subject to the rights of the public and of the City of Duluth in and to the same for the purposes of a public street.

Fourth. That the St. Paul & Duluth Railroad Company was incorporated and organized under and pursuant to the provisions of Chapter 30 of the General Laws of the State of Minnesota for the year 1876; and thereafter and on or about July 17th, 1877, it became the owner by purchase, of all of the property, rights, franchises and privileges of The Lake Superior & Mississippi Company; and the said St. Paul & Duluth Railroad Company thereupon became subject to all of the duties, obligations and liabilities of the said Lake Superior & Mississippi Railroad Company, including its duty, obligation and liability to put and continuously maintain Lake Avenue in the City of Duluth in such condition and state of repair as not to impair or interfere with its free and proper use for travel over or along said Lake Avenue; and said St. Paul & Duluth Railroad Company was by the law of the State of Minnesota,—independent of the obligations theretofore existing on the part of The Lake Superior & Mississippi Railroad Company,—charged with
7 the duty, obligation and liability to put and continuously maintain said Lake Avenue at the place of its intersection with the right-of-way of said Lake Superior & Mississippi Railroad Company, acquired by said St. Paul & Duluth Railroad Company, in such condition and state of repair as not to impair or interfere with its free and proper use for travel over and along said Lake Avenue.

Fifth. That after the land lying within said Lake Avenue, at the point where said Lake Avenue intersects the strip of land deeded to The Lake Superior & Mississippi Railroad Company by the Western Land Association for right-of-way, as hereinabove stated, was dedicated to the public as a public street or highway, and the acceptance thereof by the public, the said Lake Superior & Mississippi Railroad Company and the said St. Paul & Duluth Railroad Company constructed a large number of tracks across said Lake Avenue, at the natural grade of said avenue; and after the construction of said railroad tracks by said Railroad Companies, the said Lake Avenue was maintained as an avenue and street of said city for public travel thereon, at the natural grade of said street, and at the same elevation as the said railroad tracks so constructed by said railroad companies, for a long period of time.

Sixth. That after the incorporation of the said St. Paul
8 & Duluth Railroad Company and after it had acquired the title of The Lake Superior & Mississippi Railroad Company in and to the right-of-way abutting upon said Lake Avenue, and after the construction of the tracks along said right-of-way and across said avenue by said railroad companies as aforesaid, the travel on said avenue by the public became so great, and the passage of teams and of people in going to and fro along said avenue was so great, and the amount of business done by said St. Paul & Duluth Railroad Company on its tracks so laid across said avenue as aforesaid was so great, and the passage of cars and engines and of trains of cars along said tracks was so frequent that it became necessary

to preserve said avenue as a highway and to put the same in such condition and state of repair as not to impair or interfere with its free and proper use and not to impair its usefulness as a highway, to construct a bridge along and within the lines of said Lake Avenue and over the tracks of said St. Paul & Duluth Railroad Company, in order to carry said avenue or street over said tracks; and the said St. Paul & Duluth Railroad Company and the City of Duluth having agreed that there was a public necessity for the construction of such bridge, there was constructed a bridge for
9 the purpose aforesaid along and within the lines of said Lake Avenue and over the tracks of the said St. Paul & Duluth Railroad Company, in or about the years 1891 and 1892; the cost of the erection and construction of which bridge was largely paid by said St. Paul & Duluth Railroad Company, and which said bridge was thereafter and continues to be the sole means of passage for the public along and within the lines of said avenue, where the same is crossed by the tracks of said Railroad Company.

Seventh. That at the time of the construction of said bridge as aforesaid, the said St. Paul & Duluth Railroad Company was under the obligation and liability and it was its duty to construct said bridge for the purpose aforesaid; and since the construction of the same, and until The St. Paul & Duluth Railroad Company transferred said right-of-way and its said tracks to the respondent company herein, it was the duty of said St. Paul & Duluth Railroad Company and said Company was under the obligation and liability to wholly maintain all of said bridge as a part of said Lake Avenue; the said bridge becoming necessary wholly by reason of the construction of the tracks of said Company and of its predecessor in title across said Lake Avenue, and the business done thereon and the amount of travel on said Lake Avenue rendering a surface crossing dangerous and unsafe.

10 Eighth. That the Northern Pacific Railway Company is a corporation, organized and incorporated under the laws of the State of Wisconsin, and authorized to do business within the State of Minnesota, and operating a line of railroad within the State of Minnesota, passing through a portion of the City of Duluth. That on or about the 15th day of June, A. D. 1900, said Northern Pacific Railway Company purchased the charter, franchises and all of the property of The St. Paul & Duluth Railroad Company, including the right-of-way abutting upon Lake Avenue in the City of Duluth, hereinbefore described.

Ninth. That thereafter the State of Minnesota commenced an action against said Northern Pacific Railway Company and the said St. Paul & Duluth Railroad Company, in the district court for Ramsey County, Minnesota, having for its object the setting aside of said purchase,—the said State of Minnesota in said action claiming that said purchase was contrary to the laws of the State of Minnesota; and thereafter, while said action was pending, and on or about the 12th day of September, 1900, said Northern Pacific Railway

Company entered into a contract, in writing, with the State
11 of Minnesota, a copy of which is hereto attached and marked Exhibit A, and made a part hereof.

Tenth. That by the purchase of the charter, franchises and property of The St. Paul & Duluth Railroad Company, and also by the execution of the contract, Exhibit A, hereinbefore referred to, said Northern Pacific Railway Company has become liable to perform all of the duties and obligations of said St. Paul & Duluth Railroad Company, including the duties and obligations of The Lake Superior & Mississippi Railroad Company assumed by and cast upon The St. Paul & Duluth Railroad as aforesaid; and thereupon the said Northern Pacific Railway Company became liable and it was its duty to wholly maintain all of said bridge as a part of said Lake Avenue and to keep the same in a proper and reasonable state of repair, so as not to impair the usefulness of said avenue or to interfere with its free and proper use as a public highway.

Eleventh. That the said respondent company has wholly failed and neglected to maintain and keep in repair said bridge so constructed as aforesaid,—which said bridge is now out of repair and is out of repair to such an extent that the same is unsafe and dangerous for travel; and there is no means provided for the passage along said avenue for the public other than the said bridge.
12 That the floor or roadway of said bridge and the pavement thereon are worn out and should be replaced; that the iron work of said bridge has become rusty and the paint thereon has scaled off, and it should be thoroughly cleaned and all of the iron work upon said bridge should be repainted; and all of said repairs and repainting should be done in accordance with plans and specifications therefor, copies of which are hereto attached and marked Exhibit B, and made a part hereof.

Twelfth. That the said plans and specifications for the repairs to said bridge or viaduct were prepared by the City Engineer of the City of Duluth, and the same are necessary, reasonable and practical for the repair of said bridge; and said specifications have been adopted and approved by the Common Council of the City of Duluth, and said City has demanded that said respondent company should proceed to repair said bridge in accordance with said specifications,—which said company has wholly refused and still refuses to do, and will refuse and neglect so to repair said bridge or to make any repairs thereon, unless compelled by this Court so to do.

Thirteenth. That the said bridge or viaduct so constructed as aforesaid was built at the lowest practicable height over the tracks of the railroad companies across said avenue, and the por-
13 tions of said bridge or viaduct in said avenue leading from the lines of the right-of-way of said respondent company are of as steep a slope and the said viaduct and its approaches which are a part thereof are as short as it is practicable or safe to make them.

That said Lake Avenue is a street that is in constant use by the citizens of Duluth and by the public generally, and the people are

constantly passing over the same, and it is necessary that the same should be kept open and maintained as a public street or avenue of the city for the use of the citizens thereof and the public generally.

That the Common Council of the City of Duluth and said city are ready and willing to pass such orders and resolutions and take such action with respect to the proper repair and maintenance of such bridge, as may be found necessary or as may be designated by this Court.

Fourteenth. That said City has no plain, speedy or adequate remedy with respect to the matters set forth in this petition, in the ordinary and usual course of law.

Now therefore, we being willing to cause complete and speedy justice to be done in the matter of the petition of the City of Duluth, do hereby command that you, The Northern Pacific Railway Company, immediately after the receipt of this writ, proceed to
14 repair the bridge referred to in this writ; and you are hereby commanded to so proceed to repair and forthwith repair the said bridge as by said plans and specifications specified,—a copy of which plans and specifications are attached to and made a part of this writ, marked Exhibit B; and that after you have so repaired said bridge you will thereafter continuously maintain the same; and you are directed to so repair said bridge and maintain the same under the direction of the City Engineer of the City of Duluth; or that you show cause to the contrary on the return day of this writ, fixed in the allowance hereof;

And you are further commanded, on said return day, to make known to this Court in what manner you have executed this writ.

Witness, the Honorable Homer B. Dibell, Judge of said Court, this 11th day of August A. D. 1903.

J. P. JOHNSON, *Clerk*,
By H. A. LIEDELL,
*Deputy Clerk.*

[Seal of District Court for St. Louis County.]

The above entitled writ is hereby allowed by me this 11th day of August, A. D. 1903, and the return day of the same is hereby
15 fixed for the 22d day of August, A. D. 1903, at 9:30 o'clock A. M. at Special Term of said Court, or as soon thereafter as the Court can hear the same, at the Court House in the City of Duluth, St. Louis County, Minnesota; and

It is ordered, that a copy of this writ, together with copies of Exhibits A. and B, attached to the information on which this writ is allowed, be served on said respondent, The Northern Pacific Railway Company, in this proceeding, forthwith.

Dated, at Duluth, Minn., August 11, A. D. 1903.

HOMER B. DIBELL,
*District Judge.*

EXHIBIT A.

Whereas, the Northern Pacific Railway Company is a corporation incorporated under the laws of Wisconsin, which, having complied with the statutes of Minnesota, is duly entitled to transact business in the last named state, and exercise its powers therein the same as if it were incorporated originally in Minnesota; and at various judicial sales it acquired, prior to Sept. 1, 1896, the railway formerly belonging to the Northern Pacific Railroad Company, which is a corporation incorporated under the act of Congress of July 2, 1864; and

16 Whereas, said Northern Pacific Railroad Company built its railroad through the State of Minnesota, under and pursuant to the act of the legislature of Minnesota, approved March 2, 1865, in which it expressly provided:

"That should the said company elect to make the eastern terminus of said railroad east of the eastern boundary of the State of Minnesota, then and in that case, they shall construct or cause to be constructed, a line of railroad from the said main line to the navigable waters of Lake Superior, within the State of Minnesota, of the same gauge as said main line, for which purpose the same powers, rights and privileges are hereby granted to said company as they have or may have to construct said main line within the State of Minnesota."

And whereas, the Northern Pacific Railroad Company, under the authority and requirement of said act of March 2, 1865, constructed or acquired a railroad from Carlton to Duluth in the State of Minnesota, and acquired large terminal facilities at Duluth, and a half interest in a large *and Minneapolis and Duluth and Superior, and* portion of the terminal facilities in that city of the St. Paul & Duluth Railroad Company hereinafter referred to; and

17 Whereas, The Northern Pacific Railway Company, on or about the 15th day of June, 1900, purchased all the railway of the St. Paul & Duluth Railroad Company which had theretofore been operated as an independent line between St. Paul and Minneapolis and Duluth and Superior, and which included the interest of said St. Paul & Duluth Company in the railroad above referred to, extending from Carlton to Duluth, and the terminal property and all the interest in terminal property at and near Duluth then belonging to said St. Paul & Duluth Company; and

Whereas, a suit was recently commenced by the board of railroad and warehouse commissioners of the State of Minnesota, in the name of the State of Minnesota, against the Northern Pacific Railway Company, and the St. Paul & Duluth Railroad Company, in which suit it is sought to set aside the said purchase, and which suit is now pending in the district court of Ramsey County.

Now therefore, in consideration of the State of Minnesota causing said suit to be dismissed without prejudice, the Northern Pacific Railway Company does hereby solemnly bind itself and its succes-

sors and assigns unto the State of Minnesota forever to comply with and carry out the covenants and obligations hereinafter expressed, to-wit:

The Northern Pacific Railway Company acknowledges
18 and covenants that it holds the said railways purchased from the St. Paul & Duluth Company subject to all the public obligations in favor of the State of Minnesota, the people of the state, or the Board of Railroad and Warehouse Commissioners of the state, which would exist in favor of said state, or the people, or the Board of Railroad and Warehouse Commissioners with respect to said railways and the traffic thereof as against the St. Paul & Duluth Railroad Company, if said sale had not been made; and the said Northern Pacific Railway Company further covenants and agrees that it will forever operate and maintain the said line of railway wholly within the State of Minnesota between the cities of St. Paul and Duluth, with a branch to Minneapolis, in connection with the terminals hereinafter referred to.

The Northern Pacific Railway Company further acknowledges and covenants that its predecessor, Northern Pacific Railroad Company, built its said railroad through the State of Minnesota subject to all the obligations expressed in said law of the state, approved March 2, 1865, and that the obligations imposed by said law are now in full operation and force as against the undersigned Northern Pacific Railway Company; and that the Northern Pacific
19 Railway Company will forever operate and maintain a line of railroad extending from its main line (which main line extends from Ashland, Wisconsin, to Puget Sound and the Columbia River) to the navigable waters of Lake Superior within the State of Minnesota, of the same gauge as said main line, and will forever maintain and operate, for the benefit of the people of Minnesota and the Northwest first-class complete and adequate terminal tracks, yards and appurtenant facilities in Minnesota on Lake Superior in Duluth and in its vicinity, for the transfer from boats and other connecting carriers, and the receipt and shipment over the former St. Paul & Duluth lines, the Northern Pacific lines and its connections, of all freight originating at the head of the lake or coming into the state from outside, and the transfer to boats and other connecting carriers, and the receipt and shipment of all freight shipped to the head of the lake or via the head of the lake out of the state; that said terminal tracks, yards and facilities so to be maintained shall never be less sufficient or adequate than the terminals at present operated by the Northern Pacific Railway Company in and about Duluth; and that the people of the State of Minnesota shall always have as favorable rates on incoming and outgoing freight to, from, through or via Duluth as are given by the Northern Pacific Company
20 on similar freight, to, from, through or via Superior, West Superior, or any point on the Northern Pacific lines in Wisconsin.

In all questions arising as to the reasonableness of rates over the said railways so heretofore purchased by the Northern Pacific Rail-

way Company from the St. Paul & Duluth Railroad Company, the lines so purchased shall be treated as a distinct and separate entity.

In witness whereof, the Northern Pacific Railway Company has, by authority of a resolution of its board of directors, caused this agreement to be executed on its behalf by its president and assistant secretary and its corporate seal to be hereto affixed this 12th day of September in the year nineteen hundred.

NORTHERN PACIFIC RAILWAY CO.,
By C. S. MELLEN, *President.*

[CORPORATE SEAL.]

Attest:
R. H. RELF,
*Assistant Secretary.*

## EXHIBIT B.

*Specifications for Repairs to the Lake Avenue Viaduct and Approaches.*

### Work to be Done.

The work to be done consists of painting all iron work; planking the roadway on the viaduct proper; repairing and relaying sidewalk; resetting curbing on the viaduct approaches; and paving the roadway of the approaches with sandstone blocks on concrete foundation.

### Painting.

All the surfaces of the iron work on which the paint is imperfect or defective shall be thoroughly cleaned so as to remove all old paint and rust, and shall then be painted with two coast of paint, of such character as will best withstand the action of the atmosphere and of the smoke and steam from locomotives.

Particular attention must be given to the painting of all surfaces which are now planked over or otherwise covered, and which can be exposed in carrying out the repairs called for by these specifications.

### Planking Roadway.

The present planking on the roadway of the viaduct shall be removed, and after all surfaces of the steel work under and around the planking have been painted as above specified, the new planking shall be laid as follows:

Four inch plank of good quality tamarack or white pine lumber, not less than eight inches wide, shall be securely fastened to the floor beams by means of spikes, clinched under the upper flange of the floor beams in accordance with the present construction. Crosswise on these planks, and securely spiked to them by 30 penny spikes, over the entire roadway, shall be laid two inch oak planks. The ends of the planks next to the gauge edge of the rails of the street railway shall be neatly adzed to form a flange way.

All planks shall be free from rot, shakes, checks, punk or other defects, and not over 25 per cent. of any face shall be sap.

Relaying and Repairing Sidewalks.

All sidewalks on the approaches which do not conform to the established grade of the approaches, must be taken up and relaid in a workmanlike manner, to conform with said established grade.

Any defects in the sidewalk on the entire length of the viaduct and approaches must be repaired in accordance with the present construction of said sidewalks.

Resetting Curbing.

All curbing not built on abutment walls on both sides of both approaches shall be taken up and reset in concrete, as shown on the annexed drawing, to conform with the proper line and established grade of the approaches.

The concrete shall be composed of one part of best quality
23 of Natural Cement, two parts of clean, sharp sand, and four parts of crushed granite or trap rock, or beach gravel, with no pieces over 2½ inches in any dimension, and free from sand or dust. The concrete shall be thoroughly mixed in accordance with the standard specifications of the City of Duluth, and well rammed and tamped into place. The curb shall be well pounded down into the concrete bed.

After setting, the points shall be pointed with mortar made of equal parts of sand and best quality of American Portland cement.

Paving Roadway Approaches.

The roadway of the approaches, for the full width between curbs shall be paved with best quality of Kettle River sandstone blocks, on a six inch concrete foundation, and with the joints filled with Portland cement grout as follows:

Removing Old Pavement.

All the present paving material, as well as all other material and rubbish, including surface dirt, which is on the avenue within the limits to be paved, shall be removed and disposed of.

Preparing Sub-grade.

The material below the present pavement shall be removed to the grade and cross-section fixed by the City Engineer, and the sub-grade shall be rolled with a steam road roller weighing not less than
24 fifteen (15) tons, until thoroughly compacted.

Concrete Foundation.

On the sub-grade, prepared as above specified, shall be placed a layer of natural cement concrete, made as specified for re-setting curbing, which shall be thoroughly tamped, and when completed

shall conform to the grade and cross section of the avenue, as fixed by the City Engineer; and shall not be less than six inches in thickness.

### Headers.

Headers of Kettle River or Medina Sandstone shall be furnished and put in place at all intersections where the paving ends. The headers shall be four inches thick, not less than sixteen inches deep, and not less than four feet long. They shall be dressed smooth and square on the top surface, pointed down on both sides for six inches, and have a good joint for the depth of three inches. The headers for cross walks must have all necessary recesses cut for iron covers and finished in all particulars as directed by the City Engineer. All headers must be set true to the line, grade and cross section of the avenue, and shall be set on concrete foundations six inches deep and eight inches wide.

### Sand Cushion.

25 After the concrete foundation has been prepared, as heretofore specified, it shall be covered with a layer of clean, sharp sand, two inches in depth, containing no pebbles larger than one-half inch in diameter, smoothly and evenly spread over the roadway. When finished, the surface shall be smooth and even, and must conform accurately to the finished surface of the pavement.

### Sandstone Blocks.

The blocks used for the paving must be equal to the samples in the City Engineer's office and equal to the best quality of Kettle River or Medina sandstone, sound, free from cracks, seams or any tendency to crumble, or wear unequally. No surface rock shall be used. No stone shall be less than ten inches nor more than sixteen inches long, nor less than four inches nor more than five inches wide, nor less than six nor more than seven inches deep.

The stones shall be dressed so that they will not be more than three-quarter inch narrower on the bottom than on the top in either direction of measurement. The top bed or wearing face must be rectangular and at right angles to the side and end joints, out of wind, and with no projections exceeding ⅜ of an inch above the true surface. All sides and ends must be dressed for one-half inch joints for two and a half inches from the top.

### Laying Blocks.

26 On the sand cushion, prepared as heretofore specified, the blocks shall be placed in parallel rows at right angles to the curb line, and set perpendicular to the street surface. Each row shall consist of blocks of uniform width throughout its entire length. The end joints between the blocks shall be made as close as the blocks will admit,—the blocks to be firmly forced together at their ends. The rows must be placed so as to break all joints at least

three inches, and the joints between the rows shall not exceed one-half inch. Upon the completion of each fourth row, or oftener if necessary, the rows shall be driven together and straightened, by the use of a heavy sledge and a wooden block placed against the stones as directed.

The blocks after laying are to be thoroughly rammed by courses, three or more times, with a rammer weighing at least sixty pounds. The rammers used must not have any iron on their lower face which can come in contact with the paving. The paving, when the ramming is complete, must conform to the true grade and crown of the roadway as fixed by the City Engineer. The pavement after ramming or during the process, shall be thoroughly sprinkled or washed with water to insure the thorough bedding of the blocks, and insuring that all joints or spaces between the blocks are open to their full depth.

27 Cement Filler.

After the pavement has been properly rammed, all joints shall be filled with a grout composed of one part of Portland Cement and one part of fine clean sand. The cement and sand shall be mixed in a box of approved size and form, until of an even color. Water shall then be added in sufficient quantity to make a grout of the consistency of cream. This grout must be kept constantly stirred until applied to the pavement, which shall be done by means of scoop shovels in a manner prescribed by the Engineer. No settlings or residue shall be used.

The grout shall be applied at least twice, and the joints must be and remain completely filled. The second application of grout may be somewhat thicker than the first.

No teams or wheel barrows shall be allowed on the pavement until the cement grouting has set to the satisfaction of the City Engineer. Barricades and watchmen must be furnished to prevent damage to the pavement while the grout is setting. After the grout has been applied, the surface of the pavement shall be covered with a one-inch layer of sand, which shall be sprinkled and kept moist until the cement has thoroughly set.

Tar and Gravel Filler.

28 At the option of the City Engineer, the joints in the pavement shall be filled with tar paving cement and gravel, as follows:

Warm, clean, screened fine beach gravel, satisfactory to the City Engineer, shall be swept into the joints until they are nearly filled. The joints shall then be poured full of coal tar paving cement, of such quality and composition as shall be approved by the City Engineer. The paving cement shall be heated in kettles to such a temperature that it shall pour readily, but it must not be heated sufficiently to injure the cement or to change its characteristics.

The pouring shall be done from narrow spouted pails so that the

cement shall be confined to the joints and shall not cover any of the surface of the blocks. After the joints are poured and before the cement has become cool, the entire surface of the pavement shall be covered with a layer of sharp, coarse sand one-half inch thick.

Street Railway Tracks.

The Duluth-Superior Traction Co. will relay its tracks on the viaduct before or during the process of the work herein specified; and will furnish and put in place all necessary specially cut blocks along the inside of the rails of its tracks.

29 STATE OF MINNESOTA, *County of St. Louis:*

In District Court, Eleventh Judicial District.

THE STATE OF MINNESOTA *ex Rel.* CITY OF DULUTH, Relator,
*vs.*
THE NORTHERN PACIFIC RAILWAY COMPANY, a Corporation, Respondent.

The answer of the Northern Pacific Railway Company to the petition of the said relator and the alternative writ of mandamus issued thereon respectfully shows:

It admits that the City of Duluth is a municipal corporation and has by its charter the entire supervision and control of highways, streets, alleys and public grounds within the limits of the city, and denies that it has power by its charter to compel railroad companies to lower and bridge over their tracks or construct viaducts over the same except where such tracks are laid in streets and the public necessity requires such bridges or viaducts, and then only to require such bridges and viaducts as are demanded by the necessities
30 of the case; whether any bridge or viaduct is necessary and the character of the same are and always have been judicial questions to be determined by the courts, the same under the charter of the City of Duluth as under general rule of law in this state.

Respondent admits that The Lake Superior & Mississippi Railroad Company is a corporation as alleged, with the obligation imposed by the law of the State of Minnesota to put and continuously maintain roads or highways crossed by its lines in such condition as not to impair or interfere with the free and proper use thereof.

The respondent says that on March 21, 1873, not September 29, 1873, as alleged in the writ and petition, The Western Land Association deeded to The Lake Superior & Mississippi Railroad Company a strip of land 200 feet in width which included the right of way of said Railroad Company where it crosses Lake avenue, but denies that when said deed was executed and delivered The Western Land Association was the owner in fee simple of said land and denies that prior thereto The Western Land Association had made any dedication by plat or otherwise which included the premises here

in question. On the contrary the respondent says that The
31 Lake Superior & Mississippi Railroad Company duly condemned the premises in question by proceedings filed September 24, 1869, under which commissioners were appointed November 5th in the same year, and an award of compensation was filed December 27th in the same year. Said award, as the respondent is advised and believes, was duly paid by The Lake Superior & Mississippi Railroad Company, and thereupon it became the owner in fee simple of the premises in question. Said condemnation proceedings were had in this court. Respondent says that the railroad tracks were laid upon said premises in pursuance of said condemnation and with the full knowledge and consent of The Western Land Association long before said deed was executed and in the year 1869. The deed of March 1st, 1873, included large amounts of other property and some exchanges of property, and so far as the premises in question were concerned was intended as a mere release or quit claim of any possible right that The Western Land Association might have. Respondent admits that the said deed contained the provision quoted therefrom in paragraph third of the petition, and denies each and every other allegation contained in said third paragraph.

The respondent admits that the St. Paul & Duluth Railroad Company was incorporated as alleged and afterward became the
32 owner by purchase of all the property, rights, franchises and privileges of The Lake Superior & Mississippi Company, and it became subject to whatever duty, obligation or liability existed against The Lake Superior & Mississippi Company with respect to keeping Lake avenue in the city of Duluth in a proper condition for public travel, and also that the St. Paul & Duluth Railroad Company was by the law of Minnesota charged with the obligation and liability to maintain streets and highways crossed by it in a proper condition for public travel, but respondent denies that either The Lake Superior & Mississippi Company or the St. Paul & Duluth Company was under any such obligation so far as Lake avenue in Duluth is concerned.

Respondent denies that the tracks referred to in the petition and writ and described in paragraph five thereof were laid down after the dedication of said Lake avenue as a public street or highway, and alleges on the contrary that said tracks were laid down before the dedication or acceptance thereof as a highway by the public. It admits that after the construction of said railroad tracks and for some years before the erection of the viaduct referred to in the petition and writ Lake avenue was maintained and used by the
33 City of Duluth as a street on the same grade as that of the railroad tracks.

The respondent admits that in or about 1891 the public travel on said Lake avenue across said track had become so considerable as to make it reasonable that some provision should be made for changing the grade of said highway, and alleges that in view of that fact the St. Paul & Duluth Railroad Company and the City of Duluth entered into a contract for the construction of a bridge and ap-

proaches and the maintenance thereof, a true copy of which contract is attached to this answer, marked Exhibit "A" and hereby referred to and made a part hereof.

The respondent alleges that the St. Paul & Duluth Railroad Company complied with the terms of said contract and paid to the City of Duluth the sum of fifty thousand dollars for the construction of said bridge, and the St. Paul & Duluth Railroad Company and this respondent as its successor have at all times observed and carried out said contract and are now willing to do so. Respondent says that said contract was made for a full and valuable consideration and for the consideration among other things of the compromise and settlement of all controversies between the said City and the said Railroad Company concerning either the necessity for any
34 bridge or the character, location and specifications of the bridge if one was necessary and the future maintenance thereof.

The respondent denies that it was the obligation or liability of the St. Paul & Duluth Railroad Company at the time to construct said bridge for the purpose aforesaid, or that since said contract it has ever been the duty of the St. Paul & Duluth Railroad Company or of this respondent to maintain said bridge.

Respondent admits that the Northern Pacific Railway Company is a corporation organized under the laws of the State of Wisconsin as alleged, and that it purchased the St. Paul & Duluth Railroad Company including all its property and franchises as alleged, and that it assumed in such purchase all the obligations of the St. Paul & Duluth Railroad Company. Respondent admits that the action referred to in the ninth paragraph of the petition and writ was brought, and that thereafter the action was discontinued upon the making of the contract in writing attached to the petition and writ and made a part thereof, but the respondent denies that by said purchase or contract or in any other way it ever became liable to maintain the bridge in question.

Respondent admits that it has declined to keep said bridge in repair and as to whether said bridge is out of repair or unsafe
35 or dangerous for travel or whether the floor or roadway of said bridge and the pavement thereon are worn out and should be replaced, or as to whether the iron work of said bridge has become rusty, and the paint thereon has scaled off or as to whether any other repairs are necessary on said bridge and if so what repairs, respondent denies any knowledge or information sufficient to form a belief.

The respondent denies any knowledge or information sufficient to form a belief as to whether the plans and specifications for the said repairs prepared by the city engineer of Duluth are necessary or reasonable or practical, but admits that the said specifications *the said specifications* have been adopted and approved by the common council of the city and that the city has demanded that this respondent should repair said bridge in accordance with the specifications. Respondent admits that Lake avenue is in constant use

by the citizens of Duluth and that it is necessary that the same should be kept and maintained in safe condition as a public street.

Save as hereinbefore admitted or qualified the respondent denies each and every allegation contained in the petition.

Further answering the respondent alleges that the railway
36 tracks referred to in the petition were all laid down and in use, and the 200 foot right of way on which they were laid at the point described in the petition was acquired by The Lake Superior & Mississippi Railroad Company long prior to the dedication of any of Lake avenue where it crosses said premises and long prior to the existence of any highway or street at said point either by dedication or by user; and alleges that neither this respondent or its predecessors in title ever platted said street where it crosses said right of way, and that said street exists only by user which commenced after the acquisition of said premises by The Lake Superior & Mississippi Railroad Company and after the laying down of said railway tracks and the operation of trains over the same.

The City of Duluth is, as alleged in the petition and writ, one of the cities of the state of Minnesota, and under its charter granted by the legislature of the state there is vested in said city all usual legislative powers over and concerning streets, highways, alleys and public grounds in the city, concerning the grades of streets and the construction, maintenance and repair of any bridges which constitute a part of said streets. That pursuant to the legislative power vested in said city the city council on the 24th of June, 1903,
37 duly resolved that the city engineer prepare and submit to the council detailed plans and specifications of all necessary repairs and improvements to the Lake avenue bridge in question, including its approaches from Superior street to Sutphin street. That on the 13th of July, 1903, in the exercise of said legislative powers the city council duly resolved that the repairs set forth in the specifications referred to in the petition are necessary and proper and are demanded by the public safety and convenience; that said repairs are reasonable and practicable and are adopted and approved. By the same resolution the council resolved to demand that the Northern Pacific Railway Company immediately proceed to repair said viaduct and approaches in accordance with said specifications and that a copy of said resolution be forthwith served on said Railway Company, and that on the failure or refusal of said company to comply with such demand the city attorney was authorized and instructed to institute such action or actions as to him might seem proper to compel the Railway Company to make such repairs. This suit is brought in compliance with said ordinance or resolution. The respondent says that said ordinance or resolution was a legis-
lative act which violates the obligation of the said contract
38 Exhibit "A" attached hereto and that said ordinance or resolution is therefore void as being in violation of the Constitution of the United States.

Wherefore, the respondent demands that this proceeding be dis-

missed with costs, and the alternative writ issued herein be discharged.

NORTHERN PACIFIC RAILWAY CO.,
By C. D. MELLEN, *President.*
C. W. BUNN,
J. L. WASHBURN,
W. D. BAILEY,
*Attorneys for Respondent.*

STATE OF MINNESOTA, *Ramsey County, ss:*

C. S. Mellen, being duly sworn deposes and says that he is the President of the Northern Pacific Railway Company and knows the contents of the foregoing answer; that the same is true of his own knowledge except as to those matters therein stated on information and belief, and as to those matters he believes it to be true.

Subscribed and Sworn to before me this 20th day of August, A. D. 1903.

C. D. MELLEN.

H. A. FABIAN,
*Notary Public, Ramsey County, Minnesota.*

EXHIBIT "A."

Whereas, there exists in the City of Duluth in the State of
39 Minnesota, a certain street known as Lake Avenue, leading from Superior street southward down Minnesota Point, said street being crossed by the St. Paul & Duluth Railroad Company's right of way, in which right of way are several railroad tracks and a large number of trains pass daily, in each direction; and *direction; and*

Whereas, there is a large amount of public travel upon said street, and public necessity imperatively requires that such an arrangement shall be made, by means of a viaduct, as that the public travel along said street may be carried over said railroad tracks; and

Whereas the City of Duluth, by its charter is authorized by resolution of its Common Council, adopted by a vote of two-thirds of all the members elected thereto, to change the grades of any of its streets, avenues or alleys, in accordance with the specifications in such resolution set forth; and

Whereas a resolution of the Common Council of said City of Duluth was heretofore, to-wit, on the first day of June, 1891, adopted by a vote of two-thirds of all the members elected thereto, to change the grade of said Lake Avenue, at the point where it intersects said right of way in accordance with the provisions hereinafter
40 specified;

Now, therefore, in consideration of the premises, and of one dollar by each of the parties hereto in hand paid to the other, it is hereby agreed by and between the City of Duluth, a municipal corporation organized and existing under the laws of the State of

Minnesota party of the first part, and the St. Paul & Duluth Railroad Company, a corporation organized and existing under the laws of the said State of Minnesota, *party of the first part, and the St. Paul & Duluth Railroad Company, a corporation organized and existing under the laws of the said State of Min-* party of the second part, as follows:

The party of the first part will, under the supervision of its Board of Public Works, raise the grade of said Lake avenue so that the surface thereof shall be carried over the right of way of the party of the second part by means of a viaduct to be constructed by the parties of the first part as hereinafter mentioned. Said viaduct shall cross the right of way of the party of the second part, which right of way is two hundred feet in width at its intersection with said street, by an elevated structure having in one place a span seventy-seven feet in length and nineteen feet in the clear in height above the surface of the tracks of the party of the second part; the por-
41 tion of said viaduct comprised within the limits of said right of way to have a main roadway at least thirty feet in width, and two sidewalks each at least seven feet in width. The portion of said viaduct not comprised within the limits of said right of way shall be constructed either of iron or of earth supported by lateral walls of stone, and shall have a clear passage-way for foot passengers and vehicles. Said viaduct, exclusive of sidewalks, shall be paved with cedar block, or other equally good pavement, and the sidewalks shall be well planked. Said viaduct shall be constructed of first-class material, and in the most effective manner, and in accordance with the plans and specifications hereto annexed. Work upon said viaduct shall be commenced forthwith, and the same shall be completed within two years after the signing of this agreement. At the expiration of two years immediately succeeding the time of the signing of this agreement, the present surface grade of said street where the latter crosses said right of way, and all temporary surface crossings for pedestrians or vehicles of both, at this point shall be permanently closed and abandoned so that there shall be no further interference between public travel and the passage of the trains of the party of the second part; and the party of the first part
42 will remove all debris from said right of way. The party of the first part will maintain the portion of said viaduct comprised within the limits of said right of way for a period of fifteen years after the completion of said viaduct; and will maintain the portion of said viaduct not comprised within the limits of said right of way forever; provided that if said viaduct shall, through negligence or otherwise, be injured by the party of the second part or by its servants or agents, or by any person being upon the right of way of the party of the second part with its consent, said viaduct shall be restored by the party of the second part to a condition as good as that in which it was before such injury. The party of the first part will protect and save harmless the party of the second part from liability for any damage to persons or to property, caused by negligence of the party of the first part or of its contractors, servants

or agents, or Board of Public Works while constructing or repairing said viaduct; and will pay to property owners all sums, if any, which shall be finally adjudged to be due to them because of the taking, injury or destruction of property by the change of grade of said street or the construction of said viaduct. The party of the first part will not, nor shall its Board of Public Works make
43 any assessment upon the property of the party of the second part for or on account of the construction or maint-ance of said viaduct; it being the intent and agreement of the parties hereto that the payment by the party of the second part to the party of the first part of the sum of fifty thousand dollars ($50,000) as hereinafter provided, shall be in lieu and stead of all assessments for benefits in excess of damages for the taking of property of the party of the second part, to be caused by said public improvement, which might be imposed upon the property of the party of the second part as prescribed by law.

The party of the second part authorizes the party of the first part, its contractors, servants and agents, to forthwith enter upon said right of way of the party of the second part where it is crossed by said street, and to make excavations and build foundations, piers and any other structures requisite for the construction of said viaduct, and to so enter and operate, after the completion of said viaduct as often as it shall be necessary in order to the fulfillment of the obligation of the party of the first part to repair said viaduct; every such entry to be without any interference with the tracks, trains, cars or locomotives of the party of the second or with the trains, cars, or locomotives of any other railroad company using the tracks of the latter.

The party of the second part will pay to the party of the
44 first part the sum of fifty thousand dollars in monthly payments during the progress of the work, for work actually done upon said viaduct at the time of payment, as follows: the amount of work which shall have been done at any time to be estimated by the City Engineer of the party of the first part, and a proportionate part of said sum of fifty thousand dollars, less fifteen per centum, to be paid to the party of the first part in the manner in which the latter pays its contractors for work done on its behalf. A detailed estimate of the amount of work done in each month, made by said City Engineer, shall be by him submitted to the Engineer of the party of the second part, who shall without delay examine and approve or disapprove the same. Upon the completion of said viaduct the party of the second part will pay to the party of the first part the said fifteen per centum and any additional portion of said sum of fifty thousand dollars then remaining unpaid. The party of the second part may cause said viaduct to be examined in any part during the progress of construction by its engineer for the purpose of ascertaining whether the material placed therein is suitable for the purpose for which it is being used, and whether the said viaduct is being otherwise properly constructed; it being the intent of
45 this agreement that said viaduct throughout its entire extent shall be subject to the joint approval of said City Engineer

and the Engineer of the party of the second part. If the said Engineers shall be unable to agree upon any of such questions, or upon any estimate of the amount of work done at any time, or upon the question whether said viaduct has been completed in accordance with the provisions hereof, all matters so in dispute shall be submitted to a body of arbitrators to consist of said engineers and another expert to be chosen by them; but if said engineers cannot agree upon an expert to act with them, such expert shall be appointed by one of the judges of the District Court of St. Louis County, in the State of Minnesota, upon the application of either party hereto, notice of the application to be in writing and to be served by the applicant upon the other party at least five days before the application.

The term "Viaduct," as used in this agreement, denotes the entire improvement whereby the grade of Lake Avenue is to be raised at the place mentioned, and includes both the structure over the right of way of the party of the second part, and the approaches thereto from the two points where the surface of the said street shall be caused to depart from the present level.

46 This agreement and each covenant and condition therein expressed shall be binding upon the successors and assigns of the respective parties hereto.

In witness whereof, the said City of Duluth, party of the first part, has caused these presents to be signed by its Mayor, and attested by its clerk, and its corporate seal to be thereto affixed, this 22nd day of September, in the year One Thousand Eight Hundred and Ninety-one; and the said St. Paul & Duluth Railroad Company, party of the second part, has caused these presents to be signed by its Vice-President and attested by its Assistant Secretary, and its corporate seal to be thereto affixed upon said day and in said year.

CITY OF DULUTH,
By M. J. DAVIS, *Mayor.*
ST. PAUL & DULUTH RAILROAD CO.,
A. B. PLOUGH, *Vice President.*

Attest:

FRANK BURKE, Jr.,
*City Clerk.*
[CORPORATE SEAL.]

Attest:

W. H. COLEMAN,
*Assistant Secretary.*
[CORPORATE SEAL.]

47 STATE OF MINNESOTA, *County of St. Louis:*

District Court, Eleventh Judicial District.

STATE OF MINNESOTA *ex Rel.* CITY OF DULUTH, Relator,
*vs.*
NORTHERN PACIFIC RAILWAY COMPANY, a Corporation, Respondent.

*Stipulation.*

In the above entitled case, for the purpose of avoiding the necessity of taking depositions as to the contents of certain records in distant cities, it is stipulated and agreed that the following is a statement of facts, and that the same may be offered by either party to this proceeding as evidence in the case, subject to any and all objections to their admission as evidence in the case in all respects the same as if the records, properly authenticated, were themselves offered in evidence in open court, with proper proof that the resolutions were duly passed.

1st. On May 5th, 1869, the Western Land Association
48 passed the following resolution:

"Resolved, That the following property be sold to the Lake Superior and Mississippi Railroad Company and a deed be given for the same, viz:

1st. All the Luce Purchase" beginning near the end of the Breakwater and running thence westward.

2nd. A strip beginning at the south line of lot No. 3, and running northward 500 feet along the line of the Lake Shore, said strip to have an average width of 200 feet from the high water line.

3rd. The right of way through the various tracts on the lake, on Superior Bay and St. Louis Bay (not exceeding 100 feet in width unless more is required on account of banks or cuts) for a main line and a branch to Minnesota Point. Also site for machine shops, wood sheds, etc., to be selected by the company, not eastward of the stream running through Lot No. 3; said site not to exceed 6 acres and to be used exclusively by the Railroad Company for railroad purposes.

Payment to be made in lands belonging to the Railroad Company, to be selected by the Agent of the Land Company, at points on or near the line of the road at ($5.) Five Dollars per acre, from land not required for railroad purposes. The "Luce property" to
49 be sold at cost and 6 per cent. interest; all the remaining property herein mentioned to be sold at fifty ($50.) dollars per acre." and thereafter, upon the same day, the Lake Superior & Mississippi Railroad Company passed the following resolution, to-wit:

"Whereas, the following resolution has been passed by the Western Land Association of Minnesota at its meeting May 5th, 1869, viz:

"Resolved, that the following property be sold to the Lake Superior and Mississippi Railroad Company and a deed be given for the same, viz:

1st. All the "Luce purchase" beginning near the end of the Breakwater and running thence westward.

2nd. A strip beginning at the south line of lot No. 3 and running northward 500 feet along the line of the Lake Shore, said strip to have an average width of 200 feet from the highwater line.

3rd. The right of way through the various tracts on the lake, on Superior Bay and St. Louis Bay (not exceeding 100 feet in width unless more is required on account of banks and cuts,) for a main line and a branch to Minnesota Point. Also site for machine shops, wood sheds, etc., to be selected by the company, not eastward of the stream running through Lot No. 3,—said site not to exceed 6
50 acres and to be used exclusively by the Railroad Company for railroad purposes.

Payment to be made in lands belonging to the Railroad Company, to be selected by the Agent of the Land Company, at points on or near the line of the road at ($5.) Five Dollars per acre, from land not required for railroad purposes. The "Luce property" to be sold at cost and 7 per cent. interest; all the remaining property herein mentioned to be sold at fifty ($50.) dollars per acre.

Therefore resolved, That the above named ground and terms be and hereby are accepted and that the President of the Company be requested to have the two first named tracts marked by corner stones and that he forward a sketch to this office showing such location with his suggestions as to the location of the six acres for shops."

2nd. That on June 1st, 1869, the Western Land Association passed the following resolution, to-wit:

Resolved, That President of the Western Land Association of Minnesota be and he hereby is instructed to sell and convey in the usual form, to the Lake Superior and Mississippi Railroad Company the interest of the said Western Land Association in such and so much lands as he shall deem necessary for the purposes
51 of the railroad and the erection of an elevator on Rice's Point, Minnesota, at the rate of $50.00 per acre, payment to be received in lands of the said Railroad Company at $5. per acre as by resolution of May 5th, 1869."

3rd. That on April 8th, 1871, the Western Land Association adopted the following resolution, to-wit:

"Resolved: That the President be authorized to convey to the Lake Superior and Mississippi Railroad Company all the Company's interests in the following property, viz: The property which has been condemned along its line and at the Town of Duluth and a strip 50 feet wide on each side of the curve on the easterly side of the head of Minnesota Point as now located on the map published by the Western Land Association of Minnesota (it being understood that the westerly curve be not conveyed but remain in the ownership of the Land Company); also its interest in a strip 200 feet wide from the line of condemnation near the west side of Fourth Avenue West to the east side of Third Avenue East. Also 100 feet on each side of the track in Lot 5, Section 33, Township 50, Range 14. Also the westerly part of the water front of the City of Duluth from the

middle of Dock No. 4 to the middle of the Dock No. 7 and
52 on the northwest to the north line of Dock Street and on the east side by the Dyke as shown upon the map including the right of way 100 feet wide from the main track across Rice's Point to the track on Dock Street as shown on the map; Also 50 feet on each side of the track as now laid, running from the main line generally in a southwesterly direction to Rice Point and also a right of way and depot grounds through the several town sites on the line of the road; all to be conveyed on terms heretofore agreed upon viz: $50. per acre and to be paid for in lands now owned by the Lake Superior and Mississippi Railroad Company to be selected by the Western Land Association or its duly authorized Agent at $5. per acre."

It is also stipulated that, for all the purpose of the above entitled proceeding, but for no other purpose, the following statement of facts may be deemed established by competent evidence:

1st. The Lake Superior & Mississippi Railroad Company is a corporation incorporated and chartered by Chapter 93 of the Special Laws of the Territory of Minnesota for the year 1857, and by Chapter 1 of Special Laws of the State of Minnesota for the year 1861. The Western Land Association was a corporation organized by special act of the Legislature of the Territory of Minnesota
53 by Chapter 31 of the laws of 1857. Prior to the year 1869, the Western Land Association became the owner of that tract of land where Lake Avenue in the City of Duluth crosses the right of way of the Northern Pacific Railway Company.

2nd. That the St. Paul & Duluth Railroad Company was incorporated and organized under and pursuant to the provisions of Chapter 30 of the General Laws of Minnesota for the year 1876, and thereafter and on or about July 17th, 1877, it became the owner by purchase of all of the property, rights, franchises and privileges of the Lake Superior & Mississippi Railroad Company, and it thereupon became subject to whatever duty, obligation or liability existed against the Lake Superior & Mississippi Railroad Company with respect to keeping Lake Avenue, in the City of Duluth, in a proper condition for public travel and that the St. Paul & Duluth Railroad Company was, by the Law of Minnesota, charged with the obligation and liability to maintain in a proper condition for public travel, such streets and highways as were crossed by it after they became public highways.

3rd. That in or about the year 1891, the public travel on Lake Avenue across the right of way and railroad tracks of the St. Paul & Duluth Railroad Company had become so considerable as to make it reasonable that some provision should be made for chang-
54 ing the grade of said highway, and thereupon, in view of that fact, the St. Paul & Duluth Railroad Company and the City of Duluth entered into a contract for the construction of a bridge and approaches, a true copy of which contract is attached to the answer of the respondent herein, and made a part hereof; that the St. Paul & Duluth Railroad Company complied with the

terms of said contract and paid to the City of Duluth the sum of $50,000.00 for the construction of said bridge, and the St. Paul & Duluth Railroad Company and the Northern Pacific Railway Company, this respondent, its successor, have at all times observed and carried out said contract, and are still ready and willing so to do.

4th. That the Northern Pacific Railway Company is a corporation organized and incorporated under the laws of the State of Wisconsin and authorized to do business within the State of Minnesota, and operating a line of railroad within the State of Minnesota passing through a portion of the City of Duluth. That on or about the 15th day of June, A. D. 1900, the Northern Pacific Railway Company purchased the charter, franchises and all the property of the St. Paul & Duluth Railroad Company, including the right of way of that company at the crossing of said right of way and Lake
55 Avenue in the City of Duluth, and that by such purchase, the Northern Pacific Railway Company assumed all of the obligations of the St. Paul & Duluth Railroad Company. That on June 24th, 1903, the Common Council of the City of Duluth duly passed the following resolution, to-wit:

"Resolved, That the City Engineer be directed to prepare and submit to this council detailed plans and specifications of all necessary repairs and improvements to the Lake Avenue viaduct including its approaches, from Superior Street to Sutphin Street."

That in response to said resolution, the City Engineer submitted to the said City Council the specifications, a copy of which is attached to the petition herein, and that thereupon, on July 13th, 1903, the said City Council duly passed the following resolution, to-wit:

"Resolved, that the repairs set forth in said specifications are necessary and proper, and are demanded by the public safety and convenience.

Resolved, Further, that said repairs are reasonable and practicable for the repairs of said viaduct and its approaches; and that said repairs, as set forth in said specifications, are hereby adopted and approved.

Resolved further, that this council does hereby demand
56 that the Northern Pacific Ry. Co. immediately proceed to repair said viaduct and approaches in accordance with said specifications.

Resolved further, that a copy of this resolution be forthwith served upon the Northern Pacific Ry. Co. in the same manner as service may be made of summons in a civil action by the city clerk.

Resolved further, that in the event of the failure or refusal of said company to comply with such demand, that the city attorney be and he is hereby instructed to institute such action or actions as to him may seem proper to compel the said Railway Co. to make such repairs, or such portion thereof as the court may determine it is legally liable to make."

That thereafter a copy of such resolution was served upon the

Northern Pacific Railway Company. That said company refused to make the repairs therein demanded, and thereupon, in compliance with such resolution, this action was brought.

BERT FESLER,
*Attorney for Relator.*
C. W. BUN,
J. L. WASHBURN,
W. D. BAILEY,
*Attorneys for Respondent.*

57 STATE OF MINNESOTA, *County of St. Louis:*

District Court, Eleventh Judicial District.

STATE OF MINNESOTA *ex Rel.* CITY OF DULUTH
*vs.*
NORTHERN PACIFIC RAILWAY COMPANY, a Corporation, Relator, Respondent.

In the above entitled cause, for the purpose of avoiding the necessity and delay of taking the deposition of Col. C. H. Graves, now resident at Stockholm, Sweden, it is stipulated and agreed for the purposes of the trial herein, as follows:

1st. That the said C. H. Graves would, if present and permitted by the court, or if his deposition were taken, testify all of the matters set forth in the annexed affidavit of C. H. Graves.

2nd. That upon the trial of this action, the said affidavit or any part thereof may be offered in evidence by either party hereto, subject only to whatever objections might be interposed to the
58 proof of the statement sought to be introduced if the same were sought to be proven by the witness Graves upon the stand by question and answer, and the fact that any separate statement of fact made by affiant in said affidavit may be so involved in the construction of the sentence in which it is found that the same cannot be clearly separated will not prevent objection thereto, but the same may be objected to by either party in all respects the same as if called for directly by a question to the witness.

Dated September 25th, A. D. 1905.

BERT FESLER,
*Attorney for Relator.*
C. W. BUNN,
J. L. WASHBURN &
W. D. BAILEY,
*Attorney- for Respondent.*

STATE OF MINNESOTA, *County of St. Louis, ss:*

*Statement of Col. C. H. Graves.*

The Western Land Association was, in a measure, the creature of the Lake Superior & Mississippi Railroad Company. The same

parties, or practically the same parties, were directors in both companies. Gifts were obtained along the Bay Front and else-
58*a* where, in aid of the railroad company, which were taken over by the Land Association agreeing to give to the Railroad company all of the lands that it required for its uses.

Under this arrangement, the two hundred foot strip extending across Minnesota Point and to the westward, was a part of the lands acquired by the western Land Association and was a portion of the land which the railroad company required in that locality, and on the 5th day of May, 1869, a resolution was passed by the Western Land Association which provided for the turning over to the railroad company of such lands as it required, and on the first day of June, 1869, a further resolution was adopted definitely authorizing the transfer and conveyance of various tracts of land including the said 200 foot strip from Third Avenue East to Fourth Avenue West in the said City of Duluth; That the undersigned was for many years a member of the board of directors of the Lake Superior & Mississippi Railroad Company and is familiar with the said transactions and states that the railroad company went into possession of said 200 foot strip of land under the authority of and with the consent of the said Western Land Association and under the said arrangement, and built its railway track thereon, in the summer of 1869 and continuously remained in possession and operation
58*b* thereof until the same became the property of the St. Paul & Duluth Railroad Company; that in the summer of 1870 the said Railroad Company constructed its depot and station at First Avenue East in the said city of Duluth, and that at the time the said railroad company went into the possession of the said strip of land and constructed and began the operation of its said railroad, and at the time the said depot or station was constructed and the railroad operated to said point, and for a considerable time thereafter, there was no street or road or *road* traveled way of any kind across the said strip of land at the point where Lake avenue is now located. That the said ground at that point was low, wet, marshy and in part, at least, covered with water, there being a considerable declivity from the line of Superior street down to the railroad tracks. That the said 200 foot strip of land was occupied by the said Railroad company under the said arrangement and agreement for the conveyance thereof to the company, and it was operating its railroad thereon across said Minnesota Point and over the tract where Lake Avenue is now located, prior to the platting of Lake Avenue over said strip and prior to the opening up of a street or roadway across said strip where Lake Avenue now is. That the undersigned participated in the steps that were taken to create and open
59 up said Lake Avenue and was a stockholder in the Western Land Association from practically the time of the beginning of the corporation, and, if his memory serves him right, the plats of adjacent lands will show the said strip of land 200 feet wide designated as the Lake Superior & Mississippi Railroad land.

C. H. GRAVES.

Subscribed and sworn to before me this 1st day of February, 1904.

D. C. F. NILES,
[SEAL.] *Notary Public, St. Louis Co., Minn.*

STATE OF MINNESOTA *ex Rel.* CITY OF DULUTH, Relator,
*vs.*
NORTHERN PACIFIC RAILWAY COMPANY, Respondent.

The above entitled action came on to be heard before the Honorable William A. Cant, one of the judges of the above named court, at the regular September, 1905, term of said court, held at the Court House, in the City of Duluth, County of St. Louis, and State of Minnesota, on Monday, October 30, 1905:

Whereupon the following proceedings were had and testimony taken.

60 Appearances.

Bert Fesler, Esq., on behalf of the Relator.

C. W. Bunn, J. L. Washburn, Emerson Hadley, W. D. Bailey, for Respondent.

Mr. FESLER: If the Court please, we have a stipulation here, and I offer in evidence so much of that stipulation as begins about the middle of the third page with the words "It is also stipulated" and including from that point all the remainder of the stipulation, ending on page six, and including the title to the stipulation, but not including any portion of it on pages 1, 2 or the upper half of page 3.

Mr. WASHBURN: No objection to the offer.

Mr. FESLER: Will there be any objection to these records being the records of the register of deeds?

Mr. WASHBURN: No, sir.

(Counsel for relator offered in evidence "D" of Deeds, page 286, being the deed to the Western Land Association under which it is admitted by both parties the Western Land Association be-
61 came the owner of the land at the place in question).

Mr. WASHBURN: That admission is made and no objection is made to the introduction of the deed.

Mr. FESLER: Also "A" of Agreements, page 230, being the power of attorney from the Western Land Association to Luther Mendenhall, dated June 19, 1869; and "A" of Plats, pages 9 and 10, including the map and all of the certificates, being the plat of Upper Duluth.

Mr. WASHBURN: Objected to as incompetent, irrelevant and immaterial, having no reference to and not covering the premises or the place in question, or in any manner affecting the same, and being invalid, not in accordance with the requirements of law, not approved or certified in the manner required by law, not made by any party or parties having any interest in the place in question, not a properly authenticated map or plat or survey of the premises

purported to be platted, no foundation whatever for the introduction thereof, but not intending by this objection to raise the question that the book is not authenticated as one of the official records of the register of deeds' office. I would like to add further that said plat is wholly indefinite, without anything to designate or mark the location thereof.

62 The COURT: It may be received.

Exception by respondent.

Mr. FESLER: I also offer "A" of Plats, page 12, including both the map and all certificates and writings contained on said pages, being a plat of Cowles' Addition.

Mr. WASHBURN: Objected to upon all of the grounds stated to the introduction of the plat above.

The COURT: It may be received on the same theory that the other was.

Exception by respondent.

Mr. FESLER: Also "A" of Plats, pages 97 and 98, including the map and all writings contained on any and all of said pages, being a plat of Duluth Proper, First Division.

Mr. WASHBURN: Objected to as incompetent, irrelevant and immaterial; it does not purport to be the plat of any part of the premises in question nor at the place in question; and upon all the grounds stated as objections to the former plats offered, except that relating to description of the premises; not being intended by this to object to the authentication of the record as a record of the register of deeds.

The COURT: It may be received.

63 Exception by respondent.

Mr. FESLER: Also "A" of Plats, pages 116 and 117, including the map and all writings on both pages, being a plat of Central Division of Duluth.

Mr. WASHBURN: Objected to on the ground that the same is incompetent, irrelevant and immaterial, no proper foundation laid for its introduction, it does not purport to plat any portion of the premises south of the northerly line of the 200-foot strip of railway property—the place in question,—that the showing of Lake Avenue made upon the plat is in effect nothing more than an illustration of its location if extended across the railway property which is designated upon the plat and across the premises south thereof to the illustration of the platted property shown on the map, page 117, some distance south of the words "Minnesota Point;" and the same is objected to further upon all of the grounds heretofore stated to the introduction of the plat of Upper Duluth, with the same explanation relative to the official records; and it is further objected to on the ground that the Lake Superior & Mississippi Railroad Company were not parties to the execution of the plat.

The COURT: It may be received in evidence.

Exception by respondent.

64 Mr. FESLER: I offer in evidence "A" of Plats, pages 128, 129 and 130, including the map and all the writings on the

pages, being a plat of Commerce Division of Duluth, which was filed September 2, 1871.

Mr. WASHBURN: This is objected to on the ground that the same is incompetent, irrelevant and immaterial, especially on the ground that the Lake Superior & Mississippi Railroad Company did not join in its execution—it is not a party to it in any way—and that the designation of Lake Avenue, in so far as it purports to cross the 200-foot strip of railroad property, which I think is designated in color on said map, with the designation of the line of railroad thereon, is but an illustration in case of Lake Avenue, as in many others, where the avenue would strike corresponding avenues on the other side of the railway property if extended; and on the ground that the same is not properly executed or approved nor properly authenticated as a plat of the survey of the premises; not intending to object to the record as not an official record of the register of deeds' office.

The COURT: Objection overruled. It may be received in evidence.

Exception by respondent.

65 Mr. FESLER: I offer "K" of Deeds, pages 325, 326, 327 and 328 down to the middle of the page, being a deed from the Western Land Association to the Lake Superior & Mississippi Railroad Company, as mentioned in the alternative writ.

Mr. WASHBURN: I can't very well object.

The COURT: Received.

Mr. FESLER: I also wish to offer in evidence pages 330 and 331 of "K" of Deeds, being a deed from the Lake Superior & Mississippi Railroad Company to Thomson and Moorhead, trustees.

Mr. WASHBURN: We don't make any objection to the deed.

The COURT: Received.

It is stipulated by the attorneys for the relator and respondent that some time prior to the building of the viaduct, in or about the year 1891, certain plans and specifications for the building of the same were prepared by the city engineer of the city of Duluth, approved by the council, and a demand made upon the St. Paul & Duluth Railroad Company for the building of a viaduct in accordance with said plans and specifications; that considerable negotiation ensued; the railroad company refused to build the viaduct, disputing its obligation so to do, but later on entered into

66 the contract "Exhibit A" to respondent's answer; and the specifications and plans attached to the contract on file in the comptroller's office, providing for the building of said viaduct, are the plans and specifications made in pursuance of the council's resolution demanding the railroad to build, and which the railroad refused to build; that a copy of those plans and specifications may be certified by the city comptroller and be deemed in evidence in connection with the contract "Exhibit A" to the respondent's answer already in evidence.

It is stipulated by the attorneys that pages 27 and 43 of Roe's Atlas may be received in evidence as *prima facie* evidence of the

facts as illustrated on those pages, particularly with reference to the number of tracks of the Northern Pacific Railroad Company, or its predecessor, St. Paul & Duluth Railroad Company, at the point of crossing at Lake Avenue in the City of Duluth, and the distances shown on either side of Lake Avenue at the date of the Atlas in the year 1890, and that since said date the number of tracks has not been decreased, but that traffic thereon has been increased.

An adjournment was here taken until 2 o'clock P. M. of the same day—October 30, 1905—at which time court convened and
67 proceedings were resumed as follows:

MICHAEL D. KELLY, called as a witness on behalf of the relator, having been first duly sworn, testified as follows:

Direct examination.

By Mr. FESLER:

Q. What is your full name, Mr. Kelly?
A. Michael D.
Q. You are the roadmaster of the Northern Pacific?
A. Yes, sir.
Q. How long have you been such?
A. Since '81.
Q. Are you acquainted with the number of tracks of the Northern Pacific Railroad Company that now cross Lake Avenue under the viaduct and have you been acquainted with the number of such tracks at that point for the last three or four years?
A. Yes, sir.
Q. How many tracks were there at this point in or about July, 1903?
A. There were three.
Q. How many are there now?
A. There is five.
Q. When were the two extra tracks laid?
A. Within the last two years.
68 Q. Well, weren't they laid in the summer of 1903?
A. The two extra tracks?
Q. Yes.
A. No, sir; I think not.
Q. What is your best recollection as to when they were laid?
A. There was one of them put in in 1903, and one later on—I couldn't say.
Q. You may state, Mr. Kelly, whether or not there are a number of switch or spur tracks just west of Lake Avenue of the Northern Pacific Railroad Company?
A. Yes, sir.
Q. How many are there of such switch or spur tracks?
A. How many is there at the present time?
Q. Yes.
A. I couldn't say.
Q. What is your best judgment about it?
A. Why, I should judge there was about five.

Q. Didn't you state a moment ago to me, in looking at the map, that there were seven?

A. That is farther west.

Q. How far west?

A. Probably two blocks.

Q. With reference to Lake Avenue where do all of these
69 spur tracks run into the main lines of the Northern Pacific that run under the viaduct?

A. There is one directly under the viaduct, and from there they continue on further west.

Q. For how great a distance?

A. Well, about two blocks.

Q. In switching operations—throwing cars into these spur or switch tracks and getting them out—you may state whether it is necessary to traverse the main line under the viaduct?

A. That is owing a good deal to how many cars they have in their train.

Q. Well, there is one switch track that is right under the viaduct?

A. Yes, sir.

Q. And then they keep coming in for two blocks to the westward?

A. Yes, sir.

Q. So that any train which was two blocks long would have to run under the viaduct to get in or out of any switch?

A. Yes, providing we had a great number of cars. If they had a very few cars they wouldn't have to pass under the viaduct.

Q. The number of times that trains in such operation would have to pass under the viaduct would depend upon the length of the train and the proximity of the switch into the main line?

A. Yes, sir.

70 Q. This switch track that comes to the main line under the viaduct runs down the westerly side of Minnesota Point, does it not?

A. Yes, sir.

Q. There is also a connection with your lines, is there not, of the Omaha tracks?

A. There is, yes, sir.

Q. Those lie south of the main line of the N. P.?

A. Yes, sir.

Q. While the switch tracks that you have been referring to, with the exception of the one runinng down Minnesota Point, lay north of the main line?

A. North of the main line, yes, sir. North of the main line?

Q. Yes.

A. It would be south.

Q. The N. P. switches?

A. Yes.

Q. Are they south?

A. And also the Omaha.

Q. Now, how many spur tracks or switch tracks are there of the Omaha that run into the same line?

Mr. WASHBURN: If the witness understands the question—if that question means only what it says, there is no special objection
71 to it. If the counsel intends to inquire how many connecting tracks there are, why, he cannot ring in any other answer except as to the one connecting track; but I understood him to be inquired of as to the number of tracks there were in the Omaha's yard, for instance, further west.

Mr. FESLER: Well, I shall make that inquiry later, but it is not in this question.

The COURT: You understand the question, Mr. Kelly?

A. Yes, sir.

The COURT: Well, answer it.

A. There is one connection with the Omaha and that connects with one of our side tracks and not with the main.

Q. Where does it make its connection with one of your side-tracks with reference to Lake Avenue?

A. About 400 feet west of the main line.

Q. And where does this side-track of the N. P. connect with the main line?

A. About 400 feet east of the Omaha connection.

Q. Then if the Omaha connection is 400 feet west of Lake Avenue and the connection with the main line of the N. P. is 400 feet east of that, that would be about under the viaduct?

A. The Omaha connection is more than 400 feet; it must
72 be 800 feet from the viaduct; perhaps more.

Q. Is it a fact that all trains which go into the spur track of the Northern Pacific, into which comes the Omaha track, are entered from the main line of the Northern Pacific in the vicinity of the Lake Avenue viaduct?

A. The connection with the Omaha is merely used for transfer; very little switching we get from the Omaha.

Q. Are there not some tracks that run down the First Avenue West pier—just the first pier west of Minnesota Point—that join onto the N. P. in the vicinity of the viaduct?

A. Yes, sir.

Q. How many such lines are there?

A. Why, there is two on one side and one on the other; two on the north side and one on the south side of the two main.

Q. Where those switch or spur tracks come into the main line how far is it from the viaduct?

A. The first connection with the main line east of Lake Avenue would be about probably 150 or 200 feet.

Q. You mean west of Lake Avenue?

A. West of Lake Avenue—or east of Lake Avenue—I believe that is what you asked. East of Lake Avenue.

73 Q. Well, these switches from the first pier west of Minnesota Point come on the main of the N. P. on that side of the viaduct?

A. Yes.

Q. That is the west side?

A. Yes, that is the west side.

Q. And you say that comes in about 150 or 200 feet west of the viaduct?

A. The first connection is directly under the viaduct.

Q. Yes; the one that goes down on Minnesota Point?

A. Yes.

Q. And then the one that goes down on the next point or pier is about——

A. About 400 feet, I should judge.

Q. And the same thing is true with reference to the switching on that track as the others, if the train is long enough——

A. Yes, sir.

Q. —it will run across Lake Avenue under the viaduct?

A. Yes, sir.

Q. Have you any spur tracks down the coal dock—on the coal dock—which would be the second point or pier west of Minnesota Point?

A. Yes, sir.

Q. How many tracks have you there?

74 Mr. WASHBURN: Where is that, Mr. Fesler?

Mr. FESLER: That would be at Second Avenue West, for instance.

Q. How many tracks are there on the coal dock?

A. My recollection is there is three.

Q. Where do they connect up with the main line?

A. They connect up this same lead, about 400 feet north of the——

Q. Aren't you mistaken about the distance west of the viaduct that those lines come into the——

A. It might be possible that I am a little off on the distance.

Q. Isn't it a fact that the spur tracks from the coal dock and from the First Avenue West pier and the Minnesota Point lines all come into the main track at the same point right under the viaduct?

A. There is two connections there.

Q. How far apart are they?

A. I should judge about 100 feet.

Q. Well, then, if the switch that runs down Minnesota Point connects right under the viaduct then these others should be fixed at about 100 feet west, instead of 400 feet?

A. Well, yes; there is a difference as to where the clear-
75 ance is and where the connection is—the switches. The switches probably would be less than 400.

Q. Well, it is the switches that I had in mind in asking the question. Is it any part of your business to know the number of trains that are handled at this point?

A. I keep no track of that at all, sir.

Q. You say you have been roadmaster since '81?

A. Yes, sir.

Q. Is it or is it not true that since that time there has been a con-

stant increase in the amount of trackage, either laid across Lake Avenue at the point of the viaduct, or in the amount of trackage that has been laid in that vicinity, such that the number of trains that would cross Lake Avenue at that point would be increased?

A. The number of tracks have been increased two tracks.

Q. In 1881 there were three tracks there?

Mr. WASHBURN: In 1891.

Q. You said you began as roadmaster in 1881?

A. Yes.

Q. At that time how many tracks were there across there?

A. There was two.

Q. When was the third track put down?

76 A. The third track? Well, I couldn't say now.

Q. But it has gradually increased up to five?

A. Yes, sir.

Q. And the spur tracks have increased in about the same or a greater proportion?

A. Yes, sir, greater proportion.

Q. And as these have increased the tracks that are laid right under the viaduct have been used more and more?

A. Yes, sir.

Q. The Duluth & Iron Range Railroad Company across Lake Avenue under the viaduct?

A. They use one line to get down to the Union Depot.

Q. For over twenty years past?

A. I don't just remember when they commenced—the Iron Range commenced using those tracks.

Q. About 15 to 20 years I suppose it has been?

A. Oh, I should judge it is 15.

Mr. WASHBURN:

Q. That is for passenger trains, isn't it, Mr. Kelley?

A. Yes, sir.

Mr. WASHBURN: To get to the Union Depot?

A. Yes, sir.

Q. Well, isn't it a fact that there have been a great many logging trains also come down the Iron Range and across there?

77 A. Yes, sir.

Q. These logging trains, as I understand it, come from the Alger & Smith road—I don't remember the——

A. I couldn't say what road they come from.

Q. Do you know anything about when those logging trains began to come down with such frequency?

A. Why, I couldn't state the time.

Q. Have you any idea how many there are on an average per day?

A. I couldn't say.

No cross-examination.

L. MENDENHALL, called as a witness on behalf of the relator, having been first duly sworn, testified as follows:

Direct examination.

By Mr. FESLER:

Q. Mr. Mendenhall, when did you first come to Duluth?
A. I first came to Duluth in 1868, but I came to remain in 1869.
Q. What time in 1868 did you first come?
A. In July.
Q. How long did you remain?
A. About a week.
Q. When, in 1869, did you come to live?
78 A. I came about the same time; about in July.
Q. In July, 1869, where was the center of population in Duluth?
A. The center of the population in 1869 was—oh, I should say about Third or Fourth Avenue East and Superior street.
Q. You may describe briefly, Mr. Mendenhall, whether or not there were any people living south of where the Lake Avenue viaduct is now located, and in a general way what the business was transacted there?
A. There were people living on Minnesota Point, this side of the canal, between there and the main land, and there was a store there—that was in 1868. In 1869 we had a change; the business came more up on Superior street.
Q. There were people that lived at distances on down the Point beyond where the canal is now, were there not?
A. Well, there was not more than one or two families down there; I don't remember——
Q. What would be your judgment, Mr. Mendenhall, as to how many people lived on Minnesota Point south of where the viaduct now is?
Mr. WASHBURN: North of the canal?
Mr. FESLER: No.
A. South of where the viaduct is?
Q. Yes.
79 A. In what time; 1868?
Q. Yes.
A. Oh, I should say 50 or 75 people.
Q. And in 1869?
A. In 1868—no; not so many as that; no, there weren't over twenty people.
Q. In 1869?
A. In 1869 they began to fill in there pretty largely, by squatters largely.
Q. Did that population there gradually increase up to the present time?
A. Yes, sir.

Q. Was there any more than one store—business house—down in that section of the town?

A. There were several business houses down there, but I can't tell just how many, in 1869. In 1870 there was quite a good deal of business down there.

Q. About how many people were there in Duluth then?

A. In 1868?

Q. Yes.

A. There weren't over 30 or 40 people.

Q. In 1869.

A. Oh, Probably—why, July, 1869, there were three or four hundred.

Q. I am talking about Duluth—the town.

A. Yes.

80 Q. Well, then, in 1868 practically all of the town, or more than half of it, was down on the Point?

A. About half of it, was down on the Point; about half the people.

Q. And in 1869 that was also true, as far as proportion was concerned?

A. No, there were more up here, especially towards the close of 1869. There was a great deal of building done here in 1869 and principally it was done up this side of the railroad tracks.

Q. This side of where the railroad tracks now are?

A. Yes.

Q. What general section around this side of where the railroad tracks now are were those people living?

A. Well, they commenced to build all the way from Third Avenue West up to Third or Fourth Avenue East and back on the hill.

Q. A block or two?

A. Yes. Another little settlement grew up at Rice's Point around the railroad shops there.

Q. You may state whether or not since that time there has been a gradual increase in population both on Minnesota Point and in the city proper above the Point?

A. In a general way, yes. Sometimes there was a set back

81 for a year or two, or two or three years.

Q. You have lived in Duluth continuously since 1869?

A. Yes.

Q. During that time have you been acquainted with the amount of travel in a general way that has gone up and down Lake Avenue over the point where the viaduct now is located?

A. I have.

Q. You may state whether or not during that time there has been a gradual increase in travel.

A. There has.

Q. When was the canal opened, Mr. Mendenhall?

A. When was it opened? I think in 1871, possibly——

Q. I will ask you whether or not from about that time business houses or establishments were located down on Minnesota Point between the canal and the present viaduct?

A. Yes, there were business houses there.

Q. Well, I am referring particularly to such concerns as the Booth Packing Company or the Culver dock and the feed concerns and others that were engaged in more or less what we might call a wholesaling business?

A. The Culver dock was there and the Culver people; Culver & Stone were doing a wholesaling business there and a shipping business; the Booth Packing Company came in a good deal later.

82

Q. Well, say during the seventies, where was the wholesale district, or the district where the business was done that required loading and unloading of ships—boats?

A. Down on Lake Avenue, between Lake Avenue and the slip.

Q. You may state whether or not it is a fact that this business particularly, or other business, required a large amount of teaming across the point where the viaduct is now located as compared with other portions of the city.

A. Why, all the shipping practically during those years was down on that slip and all had to be brought up over that avenue.

Q. So that practically all the hauling that was occasioned by water transportation came over Lake Avenue at this point?

A. Practically all of it, yes.

Q. And continued to do so up until about when?

A. Oh, up till 1880 probably.

Q. Isn't it a fact, Mr. Mendenhall, that that district—what we might call the jobbing district—the district which had to do with loading and unloading of boats—was embraced within this section of Lake Avenue until along pretty near 1890, before it got moved over further to the west?

83

A. The bulk of it was.

Q. The bulk of it was there until 1890?

A. Yes.

Q. And during all of that time the most practical way to get from this portion of Minnesota Point to the other sections of the city was by traversing Lake Avenue at the point where the viaduct now is?

A. The only way, except a round-about way by St. Croix Avenue.

Q. Any other way would have been a round-about way?

A. Yes.

Q. You have been acquainted in a general way with railroad traffic across Lake Avenue where the viaduct is now situated since the time that the Lake Superior & Mississippi Railroad Company first crossed there?

A. Yes.

Q. I will ask you to state in a general way whether or not from that time to this there has been a gradual increase in the number of trains that have crossed the avenue at that point?

A. I think there have. There has been increased railroad travel I should say.

84

Q. I will ask you whether or not in a general way there has been an increase in the frequency with which trains have crossed that point during that time?

A. My knowledge of that would not be accurate, but I would say that there had been.

Q. Since the viaduct was built has Lake Avenue continued to be the main thoroughfare between that lower section of the city and the city proper?

A. It has.

Q. And substantially all of the business that has been transacted in that section of the city has been done over the viaduct?

A. Practically all of it, yes.

Q. You have been connected with the street railway company of Duluth for a good many years, have you not?

A. Yes.

Q. Since when?

A. Since about 1885.

Q. Can you tell me when the street railway tracks were first laid on Lake Avenue over this point?

A. On Lake Avenue? No, I can't tell you the year, but that is rather recent.

Q. Were there any street railway tracks down Lake Avenue before the viaduct was built?

85 A. No; I would say no.

Q. Would you say that the street railway have been operating cars down that avenue for ten years past?

A. Yes, I should think so, but not much more; probably ten or twelve years.

Q. But from the time they began operating them up to the present time they have continuously operated a line——

A. They have, yes, sir.

Q. —over the viaduct?

—. ——

Q. Mr. Mendenhall, do you remember about what was the population of Duluth in 1890?

A. 1890. No, I don't.

Q. Do you remember what it was in 1895?

A. In 1895? No, I couldn't give the figures.

Q. 1900?

A. 1900, I can't give you the figures there. I can give you about what they were, but I couldn't give you the census figures.

Q. What is your judgment, Mr. Mendenhall, as to the number of people that live on Minnesota Point below the canal?

Mr. WASHBURN: That is objected to as immaterial.

The COURT: Overruled.

A. The number of people below the canal at this time, do you mean?

86 Q. Yes, sir.

A. Well, I couldn't very well say with any degree of accuracy, but I should think from three to five thousand people in the summer and perhaps less than half that in the winter months.

Q. Has that been about the number of people that have been there for say three years past?

A. The people are increasing there every year, as I understand and believe; probably more this year than ever before.

Q. What is the direct route for those people to get to the main portion of the city?

A. Over Lake Avenue, crossing by ferry and crossing the viaduct.

Q. This population that you have referred to extends across the canal probably a distance of three miles?

A. Yes, three to four miles.

Q. And Lake Avenue that the viaduct is on extends the whole length of that distance down the Point?

A. The whole length, yes. It is not improved all the way down, but it is dedicated.

No cross-examination.

W. B. PATTEN, called as a witness on behalf of the relator, having been first duly sworn, testified as follows:

87 Direct examination.

By Mr. FESLER:

Q. Mr. Patten, what is your business?

A. Civil engineer.

Q. What was your business in the year 1903?

A. I was city engineer of the city of Duluth at that time.

Q. During the entire year?

A. Yes, sir.

Q. How long have you been city engineer of the city of Duluth at different times, Mr. Patten?

A. I was city engineer in the years 1883, 1884 and 1885; in the years 1895, 1896 and 1897; and in the years 1901, '2, '3 and '4, part of.

Q. You are acquainted, Mr. Patten, with the location of the Lake Avenue viaduct?

A. Yes, sir.

Q. I will ask you whether or not you made an examination of that viaduct in the year 1903 with reference to its safety or otherwise?

A. I did.

Mr. WASHBURN: That is objected to as incompetent, irrelevant and immaterial.

The COURT: Overruled.

Q. By what authority did you make that examination?

Mr. WASHBURN: I object to this question and to all other questions and to all evidence sought to be adduced and tending
88 to show the viaduct in question or the approaches thereto would be out of repair or in a dangerous condition in the year 1903, or at any time since or at any time prior thereto since the completion of said viaduct by the city of Duluth, and as incompetent, irrelevant and immaterial.

The COURT: Objection overruled.

Mr. WASHBURN: And inadmissible under the pleadings.

The COURT: Same ruling.

Mr. WASHBURN: And may it be entered, so that I won't need to renew that objection in order to save the respondent's rights, that we are allowed an exception to that and to all subsequent testimony taken under the exception and objection.

The COURT: It may be so noted.

A. Under a resolution of the city council.

Q. There has been received in evidence in this case a resolution passed June 24, 1903, by the Common Council of the city of Duluth, which reads as follows: "Resolved, that the city engineer be directed to prepare and submit to this Council detailed plans and specifications of all necessary repairs and improvements to the Lake Avenue viaduct, including its approaches, from Superior street to Sutphin street." I will ask you whether or not that is the
89 resolution under which you made that investigation?

A. Yes, sir.

Q. I will ask you whether or not you submitted to the Council, in response to that resolution, plans and specifications for such repairs?

A. I did, yes, sir.

Q. I will ask you to examine the paper marked "Exhibit B" of the alternative writ of mandamus in this matter, headed "Specifications for repairs to the Lake Avenue viaduct and approaches" and also the blue-print attached thereto, and tell me if those are the plans and specifications which you presented to the Council in response to that resolution.

A. Yes, sir, I believe these to be the plans and specifications prepared at that time.

Q. The specifications which you have testified to are known as Exhibit "B" in the alternative writ and the plan is Exhibit "C?"

A. Yes, they are so marked.

Q. Were the repairs that are mentioned in those specifications necessary?

Mr. WASHBURN: That is objected to, in addition to the other ground, on the ground that it calls for a mere conclusion and opinion of the witness.

The COURT: Overruled.

Exception by respondent.

90 A. I considered them so, yes, sir.

—. Were they reasonable and practical for the purposes for which the viaduct was to be repaired?

Mr. WASHBURN: Same objection.

The COURT: Same ruling and exception.

A. Entirely so; in entire consonance with the common practice.

Q. At the time you made this examination of the viaduct and

submitted these plans and specifications was the bridge in your opinion unsafe and dangerous.

Mr. WASHBURN: That is objected to as incompetent and on all the grounds before stated.

The COURT: Overruled.

Exception by respondent.

A. Yes, to the extent that it should be repaired. There were a number of places where the planking was badly worn, both on the sidewalks and in the team roadway; a number of places the iron was corroded badly and scaling, and the approaches were almost impassable. They had been tried to be fixed up with rock and stuff but were in very bad condition, especially the lower approach.

Q. You are acquainted with the general construction and dimensions of the viaduct in a general way?

91 A. Yes, sir.

Q. I will ask you whether or not the viaduct was built at the least practicable height over the tracks for the purpose for which it was built.

A. My recollection is that the viaduct is lower than the railroad companies now insist on having the bridges.

Q. Well, what would you say as to whether or not it was built at the least practicable height?

A. Why, yes, I should say that it was.

Q. What would you say as to whether or not the approaches to the viaduct as built were made as steep and short as it was practicable or proper to make them?

A. They are.

No cross-examination.

L. MENDENHALL recalled as a witness on behalf of the relator, testified as follows:

Direct examination.

By Mr. RICHARDS:

Q. In whose employ——

Mr. WASHBURN: We object to any other proceedings here or any other parties participating in the trial of this cause and being represented here by counsel for the purpose of trying issues in this case, except the City of Duluth represented by its proper official attorney.

92 (Counsel for the relator then stated that the questions to be asked were to be asked at the request of counsel representing the City, and that he would shoulder the responsibility of everything brought out by Mr. Richards.)

The COURT: I think under the statements made by counsel for the City Mr. Richards may ask the questions.

Mr. WASHBURN: That may be entered on the record—that he is permitted to ask these questions, to examine witnesses, solely at the

request of the corporation counsel—the attorney for the relator—and as his own act in this case?

The COURT: Yes.

Q. You came to Duluth at what time, Mr. Mendenhall?

Mr. WASHBURN: He went over that, if the Court please, by the counsel for the City—the same witness, this afternoon. It is all on the record.

The COURT: Yes, that is true. He may answer again.

A. I came to remain here in 1869.

Q. In whose employ at that time?

A. The Western Land Association.

Q. How long did you continue in their employ?

A. Ever since that time.

93 Q. In what capacity were you acting when you came here for them?

A. Their representative here. They were simply property holders here; had no other business. I looked after their property, paid the taxes, made sales, collected the revenues.

Q. What did you do for them in reference to the laying out upon the ground or fixing the boundaries of Lake Avenue between Upper and Lower Duluth, or Cowles' Addition and Duluth Proper, First Division, if anything?

Mr. WASHBURN: Objected to as incompetent, irrelevant and immaterial.

The COURT: Objection overruled.

Exception by respondent.

(Question read.)

Q. I will add to that—in the year 1869.

Mr. WASHBURN: Then the objections to that are all renewed.

The COURT: Overruled.

Exception by respondent.

A. When I came here in 1869 Mr. Branch up to that time had been the agent of the Western Land Association and had had partly completed the surveys of what is known as Duluth Proper First Division. On my arrival all that work was turned over to me. I completed the surveys and filed the plats. The survey of

94 Lake Avenue was made in this way: that a line on the center of Lake Avenue as it appeared in Cowles' Addition of Upper Duluth was prolonged until it struck the upper line of Superior street, and at that point a monument was placed, and from that mo-ment the survey was continued and on that monument the survey was based. That was the starting monument of the whole of the survey of Duluth Proper, First Division. All east of that was numbered streets east and all westward streets west, and north of it was the numbered streets.

Q. When was that survey made; what part of the year 1869?

Mr. WASHBURN: That is objected to as incompetent, irrelevant, immaterial and not the best evidence.

The COURT: Overruled.
Exception by respondent.

A. The survey was made in the early part of 1869, commencing in May and continuing through May and June.
The COURT: What survey is that?
A. Duluth Proper, First Division.
Q. This, if I understand you correctly, had reference to the prolongation of the line of the center of Lake Avenue from Cowles' Addition north?
A. Yes.

Mr. WASHBURN: I object to that as highly leading and
95 drawing conclusions from the answer of the witness which is already on record.
The COURT: It is leading, but it may be answered. Objection overruled.
Exception by respondent.

Q. Do you know the time when you received written authority—power of attorney—to act for the Association?

Mr. WASHBURN: Objected to. The power of attorney is on record, is in the evidence, and is the best evidence.
The COURT: Overruled.
Exception by respondent.

A. Well, as I recollect it, I was already acting as agent for the Western Land Association, and this power of attorney was simply a power to plat its ground—not a general power of attorney—but a power of attorney for that specific purpose.

Mr. WASHBURN: Then I move to strike out all evidence respecting the witness acting as agent outside of the written authority of the corporation; and I move to strike out that portion of the evidence of the witness relating to what he did about laying out Lake Avenue, other than such as was done under the power of attorney already in evidence in the case, as being incompetent, unauthorized, no foundation laid for its introduction.
96 The COURT: Denied.
Exception by respondent.

Q. I will ask you if you know what the intention of the Western Land Association, the owner of these lands in Government lot 3, section 27, was in 1869 as to the dedication of Lake Avenue as a public street.

Mr. WASHBURN: Objected to as incompetent, irrelevant and immaterial.
The COURT: Objection sustained.

Q. Mr. Mendenhall, do you know whether it was a matter of common knowledge or talk in the city of Duluth, in the year 1869, that this section of land within the present limits of Lake Avenue and lying between Cowles' Addition and Superior street was to be a public street?

Mr. WASHBURN: Objected to as incompetent, irrelevant and immaterial, wholly indefinite and leading.

The COURT: Objection sustained.

Exception by relator.

No cross examination.

DAVID A. REED, called on behalf of the relator, having been first duly sworn, testified as follows:

Direct examination.

By Mr. FESLER:

97 Q. Mr. Reed, what is your business?

A. Civil engineer.

Q. Have you ever been city engineer of the city of Duluth?

A. Yes, sir.

Q. Was you in the year 1892?

A. The latter part of the year, yes, sir.

Q. I will ask you if you was assistant city engineer in the year 1891 and '2?

A. Yes, sir.

Q. When you was the city engineer?

A. I was.

Q. I will ask you whether during that time the present viaduct at Lake Avenue over the Northern Pacific railroad tracks was built?

A. Yes, sir.

Q. I will ask you if you became acquainted with the estimates that were made for the work that was done on the Lake Avenue viaduct and the approaches in the year 1891 and '2?

A. Yes, sir.

Q. I will ask you whether or not the viaduct was built in one contract or two?

A. Two contracts.

Q. The Bridge Company had the steel work and Tradeen & Wilson the rest of it?

A. Yes, sir.

98 Q. The Tradeen & Wilson contract for that part other than the steel work covered the work from Superior street clear to the canal?

A. Yes, sir.

Q. I will ask you whether or not you have taken the estimates that were made to the Bridge Company and to Tradeen & Wilson and separated out the items so as to show exactly what the cost to the city of the viaduct and its approaches was—namely, Lake Avenue from Superior street to Sutphin street?

A. Yes, sir, I have.

Q. Have you the data with reference to that in your hand?

A. Yes, sir.

Q. I will ask you whether or not you can state from that just what the exact cost of the building of that viaduct and its approaches was?

Mr. WASHBURN: That is to the city of Duluth—the viaduct that was built in——

Mr. FESLER: 1891 and '2.

Mr. WASHBURN: The present viaduct?

Mr. FESLER: Yes.

Mr. WASHBURN: That is objected to as incompetent, irrelevant and immaterial, not admissible under the issues in this proceeding. I will state for counsel's benefit that I do not mean by this objection to require him to offer record proof instead of the proof by
99 this witness. I am objecting to the proof in any form.

The COURT: The objection will be overruled.

Exception by respondent.

(Question read.)

Q. To the city of Duluth, it being understood that the viaduct referred to is the present viaduct over the Northern Pacific tracks at Lake Avenue.

A. $73,986.78.

Cross-examination.

By Mr. WASHBURN:

Q. How much of that, Mr. Reed, was for the viaduct proper and how much for approaches?

A. You mean how much for the steel portion and how much for the masonry and approaches?

Q. No, I don't mean that.

A. It depends on where you draw the line between the approaches and the viaduct. It is a little uncertain in my mind as to where you draw that point.

Q. Well, this was covered by two contracts, wasn't it?

A. Yes, sir.

Q. You have so testified?

A. Yes, sir.

Q. What was the first contract for?

A. The first contract was for the foundation and the stone walls and filling for the approaches.

Q. That was the contract with Tradine?

100 A. Fredine & Wilson, yes.

Q. A foundation for what—for the steel work?

A. For the steel columns, yes? sir, and the abutments and the approaches.

Q. How much was that contract?

A. That contract amounted to—on that portion covered by the viaduct and its approaches—$27,859.66.

Q. And the residue of it then would be on the bridge or viaduct proper itself?

A. The rest of it would be on the steel——

Q. Well, I will get at that part again. But the rest of that amount of $73,986.78 according to your estimate was expended on the viaduct itself. I know you claim part of this was too; but the rest of the amount, is that right?

A. No, not necessarily.

Q. Where was it spent, then?

A. It was spent upon the steel portion of the viaduct excepting for a few small items—stairways at Railroad street, stairway at Michigan street—about $300.

Q. Do you know how much of the item of $27,859.66 was expended on the viaduct proper outside of the matter of approaches?

A. Well, at what point do you draw the line of the viaduct proper?

Q. Now, Mr. Reed, I allowed you to testify here—to give
101 secondary evidence—on the theory that you were here prepared to answer these questions—not m[illegible]—to tell how much of this money was expended in the construction of this viaduct and how much was expended in the construction of these approaches. I am willing you should do it. If you haven't done it and cannot answer these questions then I will ask counsel if he wants to withdraw you and let you figure it out and come and testify to it.

Mr. FESLER: I would suggest if he will indicate to the witness what he considers the viaduct proper—that is whether it extends to all that part over the right-of-way or whether it is all that part between the approaches—that the witness will be able at this time——

Mr. WASHBURN: Well, with that suggestion I will follow it up.

Q. Does the bridge, or viaduct, extend over the right-of-way of the railway company the same height all the way across that right-of-way?

A. No, it does not.

Q. Can you tell me, then—suppose, for the purposes of this question, we treat the viaduct as extending across the right-of-way and call the rest the approaches—how much of the cost of the entire viaduct as you have given it is embraced in the construc-
102 tion—in the building of the structure over the right-of-way alone?

A. Well, I couldn't tell that without dividing up the steel part of the contract.

Q. What is the northerly terminus of this bridge, or viaduct, and approaches? Is it Superior street?

A. South side of Superior street.

Q. The railroad right-of-way begins how far south of that?

A. Well, it is somewhere in the neighborhood of 300 feet; 350 feet.

Q. That would be the length of the row of lots on the south side of Superior street and the distance across Michigan street and a still further row of lots before you reach the railroad right-of-way?

A. Yes, sir.

Q. How far below the railroad right-of-way does that portion of the structure extend, included in your figures—your calculation?

A. It extends to the north side of Sutphin street.

Q. How far, Mr. Reed, would that be, about?

A. From the south side of Superior street.

Q. From the south side of the railroad right-of-way?

A. Why, I can't—I don't recollect now.

103 Q. Could you, by reference to one of those blue papers there——

A. Yes, sir, I think so.

Q. (Continuing:)—sum it up? Do that?

(Witness refers to blue-print.)

Q. The abutments on the northern end of this viaduct were between Superior and Michigan streets?

A. Yes, sir.

Q. So that when the superstructure came on it it came down—or up, rather—to the line of Superior street practically on a level with Superior street?

A. Yes, sir.

Q. And I will ask you if the bridge itself, or viaduct—what we may call the straight part, or level part—if it did not extend a considerable distance northerly of the railroad right-of-way?

A. Yes, sir; it extended somewhere in the neighborhood of 100 feet, I think, north of the right-of-way.

Q. And began to slope down to the southward on the southerly end something like 100 feet northerly of the southerly line of the right-of-way?

A. About 150 feet.

Q. 150? So much as that?

A. Yes, sir.

104 Q. And the southerly abutment was about how far south of the right-of-way?

A. About 250 feet.

Q. And the entire southerly end of what you call the approach was how far south of the southerly line of the railroad right-of-way?

A. In the neighborhood of 600; feet; about 634 feet.

Q. The length of the bridge itself proper was what?

A. 684 feet and 32-100.

Q. Now, Mr. Reed, when you say the total cost of this viaduct was $73,986.78, I suppose a portion of that, in so far as it is concerned with the grade of Lake Avenue generally, was a matter of estimate by you, was it not, in separating it?

A. No, sir; it was based upon the actual prices that were paid the contractors, and a division of the quantities were made at the north line of Sutphin street.

Q. When did you make these figures from which you have been testifying and which you have used in making these statements here upon the stand; how long ago?

A. Why, a year or two ago; I think two years ago. I don't remember whether there is a date on that paper or not.

Q. For what purpose did you make them?

A. For the purpose of testimony.

105 Q. That was when you were getting ready to testify in this case when it was expected to come on before?

A. I don't know whether it was this case or not. It was a similar case, I think.

Q. Well now, you have figured out here that the Schuttler Bridge Company—the amount that was paid to them was $46,127.12, which included some three hundred and fifty or seventy-five dollars for some outside matter—stairways and so forth. Did that cover the steel work and bridge work throughout the entire length of the viaduct and the approaches where steel was used?

A. Yes, sir. There was no steel work, however, outside of the abutments.

Q. Then we will get at the matter right, will we, if we say that covers the steel work—the construction—from the northerly to the southerly abutments?

A. Yes, sir.

Q. Would you be able at this time to testify or make an approximate estimate of how much—what proportion—of this entire cost that you have mentioned would be involved in the construction of that part of the viaduct extending over the railroad right-of-way?

A. I could give a close figure of the steel portion of it, but
106 not including the foundation and the piers that support the steel work.

Q. Well, that would help a little. Do that.

A. It would be about $14,000.

Q. About $14,000?

A. Not including the abutments.

Q. Not including the footings, you mean?

A. I mean the piers.

Q. Now, the entire contract for the construction of approaches, so far as it involved work outside of steel work, was something over $27,000?

A. Yes, sir.

Q. Now, the matter of the construction of footing on which to place these steel pillars within and upon the railroad right-of-way would be a comparatively small portion of that entire contract, wouldn't it?

A. Well, it is something less than the steel work, but the piers were expensive, for the reason——

Q. Well, but your piers covered 684 feet for the upright part of the bridge and your same contract that you have mentioned as $27,000 covered all the additional approach work—cement work and so forth—for the long approaches?

A. Yes, sir. I haven't——

Q. Wouldn't be over a tenth, would it, on an estimate of the total amount of that outside work?

A. Yes, I think it would.

107 Q. Couldn't much exceed that, could it?

A. You are speaking as to the railroad right-of-way?

Q. Yes.

A. Well, it would be a matter of guess work to say how much that is now, without separating the items. It is some time ago since that was put in and I wouldn't want to state without referring to the figures—making a separation of the quantities.

Q. It wouldn't necessarily be but a fraction of it when you come to take into account that whole work?
A. Certainly a fraction, yes, sir.
Q. What is the grade from Superior street to where the viaduct is level?
A. There are two grades—1.96 feet and one at 2.54 feet.
Q. What is the first one?
A. The first one is 1.96.
Q. Where is that from?
A. That is from Superior street to the abutment.
Q. Yes.
A. And from the abutment to a point near the south line of Michigan street it is 2.54.
Q. What is the grade of the approach on the southerly side?
108 A. The lower end of it is 3.84 and the balance is 3.65.
Q. And the 3.65 per cent. grade entends for 100 to 125 feet over the railroad right-of-way, doesn't it?
A. Yes, sir.

Redirect examination.

By Mr. FESLER:

Q. Mr. Reed, was this viaduct built at the least practicable height over the railroad tracks?
A. Yes, sir, it was.
Q. Were the approaches made as steep—as short as it was practicable to make them?
A. I think so, yes, sir.

Recross-examination.

By Mr. WASHBURN:

Q. Well, you wouldn't want to say that, would you? An approach could be made at a much less grade from the south than 3.65 feet, couldn't it?
A. Yes, sir, it could be made.
Q. What is the grade of Third Avenue West between Superior street and First stree-?
A. Well, that is about seven per cent.
Q. What is the grade of Fifth Avenue West between Michigan street and Superior street?
A. I don't remember. I guess 12 or 15 per cent.
Q. The grades of the avenues in the city of Duluth run
109 all the way from between what? Paved avenues run all the way between—the graded and paved avenues—between what heights?
A. I think the steepest is about 15 per cent.
Q. And down as low as——
A. From that down to zero.
Q. Suppose the abutment, the northerly abutment, instead of

being put midway between Superior street and Michigan street had been put on the southerly side of Michigan street, what would the grade have been from that point to the northerly side of the railroad right-of-way?

A. That wouldn't necessarily affect the——

Q. I won't put it that way. I will put it—what would it have been to a point about the center of the railroad right-of-way where you began to slope to the south?

A. In other words you mean if a straight line was drawn from the south side of Superior street to the elevation of the viaduct at the center of the railroad what would the grade have been?

Q. No; I mean if you were to put your northerly abutment on the south side of Michigan street and extended your grade from the center of the railroad right-of-way practically at the point where you begin to extend your grade down south.

110 A. And kept the abutment at the same elevation, you mean?

Q. No, sir; I mean brought your abutment down to Michigan street.

A. Oh, I would ask you to repeat that question, if you please.

Q. Maybe I can show you by this what I mean. I guess you have got the same thing there, though; I don't know that that is the same. No; I think this is better (referring to blue-print). This point here where the figures "30" and "3" are marked you have testified is about 125 feet or thereabouts?

A. 150.

Q. From the southerly line—from the southerly of the railroad right-of-way?

A. Yes, sir.

Q. I am asking you now if you take that same point and extend—or if you will take a point in the center of the railroad right-of-way over the center of it—that would be 100 feet each way—50 feet from that point that I am speaking about—and extend the grade downward to the north to meet Michigan street—I am asking you what the grade would be.

A. Michigan street at its present elevation, you mean?

Q. Oh, I don't know about that. I suppose so. I don't

111 know what it is there—whether it has been improved any there or not. Carry it over here to the center (indicating on blue prints) carry it on level to the center.

A. About eight per cent.

The COURT: Does that mean a uniform grade from the south side of Michigan street——

A. Yes, sir.

The COURT: —to the center of the railroad right of way?

A. Yes, sir; the south line of Michigan street about the center of the right-of-way.

Re-redirect examination.

By Mr. FESLER:

Q. Mr. Reed, you say the way that viaduct was built it was built at the least practicable height, you stated?

A. Yes, sir.

Q. If that were true and you run a grade in a straight line from the south side of Michigan street to the middle line of the right-of-way it would be too low on the northerly side of the right-of-way, wouldn't it?

A. Yes, sir.

Q. Mr. Reed, you, as representing the city of Duluth, and the chief engineers of the St. Paul & Duluth Railroad Company representing the railroad company, agreed upon the plan of this
112 viaduct as the most practicable for the purposes, did you not?

Mr. WASHBURN: Objected to as not the best evidence.

Mr. FESLER: This is not an agreement between the City and the railroad company, but between the City and the engineers.

Mr. WASHBURN: That is objected to as incompetent, irrelevant and immaterial.

The COURT: Well, unless that is in writing the evidence is competent, I should think.

Objection overruled.

Exception by respondent.

Mr. WASHBURN: No foundation laid for it.

The COURT: Same ruling.

Exception by respondent.

A. Yes, sir.

Q. This viaduct that is referred to in the question is the viaduct that is now in existence at that point?

A. Yes, sir.

Relator rests.

Mr. WASHBURN: We offer in evidence the first portion of the stipulation from the beginning down to the part already offered in evidence, which is the first, second and the first half of the third page.

Mr. FESLER: The relator objects to paragraph 1st of the
113 offer on page 1 of the stipulation as incompetent, irrelevant and immaterial for the reason that the place of intersection of the railroad right-of-way with Lake Avenue is not described in the resolution recited in said paragraph, and that if it is it has the effect of changing the terms of a written instrument, namely, the deed of March 1st, 1873.

Mr. WASHBURN: I will state in this connection that I will offer, as soon as I *will offer, as soon as I* can get to it, the plat of the railway as laid out, showing the railway line and its branches—intersections—on file in the office of the clerk of court in condemnation proceedings.

The COURT: You may be right technically, but I think I will overrule the objection.

Mr. FESLER: I have the further objection to the second paragraph

of the offer that if anything that is the resolution that authorizes the president of the Western Land Association of Minnesota to sell and convey in the usual form to the Lake Superior & Mississippi Railroad Company the interest of said Western Land Association in such and so much lands as he shall deem necessary for the purposes of the railroad and the erection of a railroad on Rice's Point, Minnesota.

The COURT: I will overrule the objections. It may be received.

114 Mr. FESLER: We object to these first, second and third paragraphs as incompetent, irrelevant and immaterial.

The COURT: Objection overruled. It may be received.

Exception by relator.

Mr. WASHBURN: There is another stipulation relative to the statement of Col. Graves attached to an affidavit that had been obtained from Col. Graves for some preliminary purpose—or motion, rather. I think the best way I can do with it is to offer and read until some portion of it is objected to.

Mr. WASHBURN: Now, I will offer in evidence the sworn statement of Col. Graves attached to this stipulation.

Mr. FESLER: That is objected to, and each and every part thereof, as incompetent, irrelevant and immaterial, it not appearing that Col. Graves is authorized to speak for either corporation—the Western Land Association or the Lake Superior & Mississippi Railroad Company; that it is an attempt to vary the terms of a written instrument by parole evidence; and for the further reason that all such matters testified to by Col. Graves are merged in the deed recorded in "K" of Deeds, page 325.

The COURT: The objection may be overruled and the
115 paper received in evidence for what it is worth.

Exception by relator.

Mr. WASHBURN: I wish to offer in evidence from file No. 16 of the files of the clerk of court of this county the petition in condemnation proceedings and the plat showing the location of the railway of the Lake Superior & Mississippi Railroad in the city of Duluth, and more particularly that plat and that portion of the plats accompanying the petition which show the location of the railroad from a point upon or near the lake shore opposite or near to Third Avenue East, or a line extended southerly therefrom, in the city of Duluth, westward between Michigan street and the northerly line of Railroad street as now shown upon the plats and extending across the base of Minnesota Point for a width of 200 feet and across the place where is now located Lake Avenue and the Lake Avenue viaduct.

Mr. FESLER: That is objected to as incompetent, irrelevant and immaterial, it appearing from the files themselves that no title was acquired or condemnation proceedings completed with reference to the land in question—the crossing of Lake Avenue with the present railroad right-of-way—and that any portion of said proceedings,

or any portion of the map accompanying the same which
116 may show any location or intended location of the railroad track or right-of-way across Lake Avenue is irrelevant, immaterial and incompetent, because no proof had been introduced to identify any such portion of said condemnation proceedings or plat with the present location of the right-of-way across Lake Avenue.

The COURT: I will overrule the objection. It may be received.

An adjournment was here taken until Tuesday, October 31, 1905, at 9:30 o'clock A. M., at which time court convened and proceedings herein were resumed as follows:

Mr. FESLER: I understand, if the Court please, that all of the files of District Court No. 16 were offered and admitted in evidence?

Mr. WASHBURN: No, I didn't offer them all, because there is a great mass of them there. I offered the petition and the plat; but I am willing, if you prefer, to have the award of the commissioners go with it; but I admitted that no award was made for this piece; and I am perfectly willing—I think that would be all that would be essential anyway.

Mr. FESLER: If the admission is made——

Mr. WASHBURN: I will offer the award.

Mr. FESLER: Then all I care for is the admission.

117 Mr. WASHBURN: Well, I made that yesterday, but I think perhaps I might as well offer it in connection with the admission, and then we can eliminate it if we don't want to lumber up the record.

Mr. FESLER: There is no special objection to the award other than the objections that I made to the petition and the map yesterday.

The COURT: It will be received.

R. C. MITCHELL, called as a witness on behalf of the respondent, affirmed as follows:

Direct examination.

By Mr. BAILEY:

Q. Mr. Mitchell, how long have you lived in Duluth?

A. Something over 35 years.

Q. When did you come here; what year?

A. I came to the head of the lake to reside in May, 1869.

Q. Well, what was your business for the first few years after you came?

A. Publication of a newspaper.

Q. When did you commence that publication?

A. I commenced the publication of the Superior "Tribune" on July 1, 1869, and commenced the publication of the Duluth
118 "Tribune" May 1st, 1870.

Q. Did you live over in Superior the first year that you were here?

A. I lived there from May until the next April; from May, 1869, till April, 1870.

Q. And when you moved over to Duluth where did you reside; what portion of the city?

A. Where?

Q. Yes, first.

A. I resided at what is now 216 Second street. It was just nearly opposite the residence of George Lautensclager.

Q. 216 East or West Second street?

A. East.

Q. Were you, during the first years that you were here, frequently down on Minnesota Point—what is now Minnesota Point?

A. Yes, sir.

Q. Do you remember when the Lake Superior & Mississippi railroad was constructed across what is now Lake Avenue, where the Lake Avenue viaduct is?

A. It was in the early part of the year 1869.

Q. Was it constructed at the same point at which the tracks now are?

A. Yes, sir.

Q. And has ever since remained there?

A. Yes, sir.

119 Q. Calling your attention to this plat of Central Division and to the lines which show apparently water up about Superior street at the point where Lake Avenue now is; does that show substantially a correct outline of the situation as it was in 1869 and 1870 at that point?

A. As I remember it it does.

Q. What was the condition of the ground, or what was the condition of the surface, rather, at the point where the Lake Avenue viaduct now is, in 1869 and 1870, outside of the actual line of the railway?

A. That was a swamp, and the railroad track was built on piles all the way from the base of Minnesota Point to Rice's Point.

Q. Was there any travel across where Lake Avenue now is, in 1869 or 1870; that is, I mean on the Avenue?

A. No, sir.

Q. No travel of any sort?

A. Well, there was no possible way to travel without going in a boat or wading.

Q. The only travel, then, was by boat at that point; is that right?

A. No, sir.

Q. Well——

A. Because it was a swamp; it was neither fitted for foot
120 travel nor boat travel. Farther to the right they could have travelled by boat.

Q. What is that?

A. Farther to the right—farther west they could have gotten down on the Point by boat but not where Lake Avenue is.

Q. That, you say, was a swamp?

A. That was a swamp.

Q. Do you remember when the trains first went through from Duluth to St. Paul?

A. The first train through from St. Paul to Duluth was on the 1st day of August, 1870.

Q. Do you know whether the railroad had been built from Duluth to Thomson, or near Thomson, for some time before that, and whether trains had been running on that portion of the road for some time before August 1, 1870?

A. Trains had been running from St. Paul to Thomson for some months, and trains had been running on this end of the road from here to near Thomson for considerable time before there was a through train, because the last portion of the road that was constructed was the rock work at Thomson.

Q. Was there a dock over on the easterly side of Minnesota Point where freight was unloaded?

A. Yes, sir.

Q. From some time prior to the time when trains went through to St. Paul?

121 A. Yes, sir.

Q. And whether or not considerable of the freight and of the materials which went into the construction of the road was unloaded at that dock and carried over the road to points further west for construction?

A. Yes, sir.

Q. Do you know whether any of the iron of the road was unloaded in that way—brought up in that way?

A. Yes, sir.

Q. That dock, then, would be at what point—about where First Avenue East is now or a little further east than that?

A. That dock——

Q. That is, First Avenue East extended, I mean, down into the lake.

A. No, sir.

Q. Where would it be?

A. That dock was substantially where the docks are now. I will state that the first warehouse was called Luce's dock and warehouse, which was on the lake side of Minnesota Point, just this side of the canal. He had a log dock extending out there two or three hundred feet and had a cheap warehouse built there; that was the first one; then the next one was—the one used by the rail-

122 road was substantially where the dock now is, at from Second to Third Avenue East.

Q. And the tracks extend up to that dock? The railroad tracks, I say—do they extend up to that dock?

A. Oh, yes, sir, yes, sir.

Cross-examination.

By Mr. FESLER:

Q. Mr. Mitchell, you say that there was swampy land across where Lake Avenue now is?

A. Yes, sir.

Q. The railroad company had to build an embankment there then, I suppose?

A. An embankment?

Q. Yes, to put their tracks on.

A. No, sir; they drove piles.

Q. When did they begin driving piles?

A. Well, it was in the early part of 1869.

Q. Do you remember about how early? About how early?

A. No, sir, I don't.

Q. Did they drive their piles for the portion of their road bed west of this point prior to the time they drove it at Lake Avenue?

A. No, sir, they commenced at the base of Minnesota Point and drove their——

Q. You mean at the east side of the base?

A. No, sir, I mean at the west side.

Q. Oh, at the west side.

123 A. The west side of the base of Minnesota Point.

Q. At about First Avenue West that would be?

A. Yes, sir.

Q. And then they drove their piles eastward——

A. No.

Q. —to the place where you say the dock was?

A. Well, they didn't.

Q. As far as necessary?

A. They didn't drive piles in the lake. They built their warehouse right east of the base of Minnesota Point on the main land.

Q. They drove piles just as far east as it was necessary to drive piles in order to get the base for the railroad?

A. Well, there was no need of their driving piles across the base of Minnesota Point, because that was dry land.

Q. Well then, if it was necessary they didn't do it?

A. They didn't do it.

Q. So that they drove piles as far east as it was necessary to drive them?

A. Well, they commenced at the west side of the base of Minnesota Point, to which point the swampy land extended, and drove their piles westward to Rice's Point.

Q. Then the swamp only extended to the west side of

124 Minnesota Point?

A. Well, there always was a road down St. Croix Avenue.

Q. Well, the west side of Minnesota Point would be about where the base of First Avenue West is now?

A. Yes, substantially.

Q. Then if the swamp only came up to the west side of Minnesota Point there was no swamp where Lake Avenue is now?

A. Why, of course there was.

Q. Well, we will drop that. Now, when did they build their line—drive their piles between Minnesota Point and Rice's Point with reference to the time that they drove it at Lake Avenue?

A. Well, they commenced in the summer of 1869 with their pile-driving on the west side of the base of Minnesota Point and drove westward.

Q. Now, how far west did they drive the piling?

A. Drove it to Rice's Point.

Q. From Rice's Point on west did they drive piling?

A. Yes, sir.

Q. Now you say that was in the summer of 1869 that they began driving the piling?

A. Yes, sir.

125 Q. Did they have any of their road built—their roadbed built—from Thomson toward Duluth at that time?

A. No, sir.

Q. They began the part of the line between Duluth and Thomson at Minnesota Point then?

A. Well, they didn't begin it, because they had been working at that portion of the road near Thomson for a year and a half or two years; they had to blast it out and had to build those trestle bridges that have disappeared now because it has been filled up.

Q. But now speaking about the part of the road bed this side of Thomson, after we get out of the rock cut there, had they done any work on that before they began the work on Minnesota Point?

A. Nothing except the rock work at Thomson, I think.

Q. Now they began driving the piling here at the west side of Minnesota Point in the summer of 1869?

A. Yes, sir.

Q. Then they had to drive the piling that might be necessary in the city of Duluth and prepare their road bed clear through to the rock work at Thomson before they could lay any rails?

A. Why, they laid the rails at this end of it early in the season.

126 Q. Yes. How early?

A. Well, as soon as they got ready for it.

Q. Well, I am trying to fix a date if you can fix it for me.

A. Well, I couldn't tell the month, except that I know it was in the summer of 1869.

Q. Did the Lake Superior & Mississippi Railroad Company ever fill in around their piling with dirt so as to make a——

A. Yes, sir.

Q. When was that done?

A. Oh, that wasn't done for a good many years.

Q. Not for a good many years?

A. No.

Q. Well now, Mr. Mitchell, I am simply trying to get at the

facts. My information is, from notes that I have not only of the testimony that you gave in some preliminary proceeding in this matter but also in the files of the "Minnesotan" and also from a picture I have seen, that you were just a year too early on this. Now, I think your testimony before was that this began in 1870, and the records of the "Minnesotan" show that and the picture that I have seen shows that the filling was done earlier than you say. Now, with those statements do you still think it was early in 1869 that they began to build, or was it in 1870?

127 A. I know it was in 1869. If I ever made any such statement as that it was without refreshing my memory by looking up the data.

Q. Had that work all been done when you first came to Superior?

A. No, sir.

Q. You say you moved over here in April?

A. April, 1870.

Q. Well now at that time had it all been done?

A. At that time they were running cars on this end of the line.

Q. Do you remember the winter of 1869 and '70 with reference to the fact as to whether or not after this marshy place that you referred to—or whatever there was there—had frozen over that the people traveled where Lake Avenue now is across that stretch of land?

A. When that swampy plateau was frozen over, why, of course they could travel any place.

Q. Well, didn't they do it? Wasn't that the way that they got from Minnesota Point to Superior street generally?

A. Well, I don't think it was. I think they came up the road on St. Croix Avenue. There was always a wagon road down there.

Q. And if a person had a wagon—a load of stuff—on Lake Avenue below the railroad where it is now and wanted to

128 bring it to Superior street near the vicinity of Freimuth's store they would have gone around St. Croix Avenue instead of coming across where Lake Avenue now is?

A. They certainly would, because at Lake Avenue where it is now there was originally an embankment there 20 or 25 feet high.

Q. I am not asking you for the reason, Mr. Mitchell; I am asking you whether or not they did that or didn't do it.

A. I don't think I ever knew of anything like that to be done.

Redirect examination.

By Mr. BAILEY:

Q. You say, Mr. Mitchell, there was an embankment where Lake Avenue now is up near Superior street?

A. At Superior street.

Q. How is that?

A. Yes, sir.

Q. Up near Superior street.

A. There was an incline like that (illustrating); that is, it would have been impossible for a team to have gotten up from the swamp

to Superior street at the junction of where Lake Avenue now is, because of this steep embankment.

Q. You say in 1870 when you were over here the cars were running upon a track at this end and across Lake Avenue?

129 A. Yes, sir.

Q. Where the viaduct now is?

A. Yes, sir.

Q. You have recently looked up the data and these dates in the papers published at that time, have you?

A. Yes; I have looked it up in the paper that I published and also in the "Minnesotan."

—. How recently have you looked it up; within the last month?

A. Yes, sir.

Q. Or within the last week?

A. Within the last month! two or three Sundays ago.

Recross-examination.

By Mr. FESLER:

Q. When was the dock constructed, Mr. Mitchell, with reference to when the piling was driven—before or after?

A. Well, I couldn't say as to that. I should judge that they were both done about the same time.

The COURT: About when was Lake Avenue first traveled, Mr. Mitchell, across the present right-of-way of the railroad company?

A. Well, it was not opened up for some time. I guess I can give the dates probably; (referring to paper) it was not opened

130 up, though, for quite a while.

Mr. FESLER: I would ask Mr. Mitchell to look up the question the Court asked, as well as the one I referred to.

The COURT: I want to know, Mr. Mitchell, not only when the matter was opened up, as you speak of its being done by the officials of the village, or city, but when the road was first actually used, if you have any means of refreshing your memory upon that point.

(Witness withdraws for the present.)

GEORGE G. BARNUM, called as a witness on behalf of the respondent, having been first duly sworn, testified as follows:

By Mr. WASHBURN:

Q. Mr. Barnum, you reside in Duluth?

A. Yes, sir.

Q. How long have you lived here?

A. About 38 years.

Q. What is your business now?

A. I am in the grain business.

Q. What was your business during the first years that you resided here?

A. I was in the engineer department of the Lake Superior & Mississippi railway.

Q. Were you engaged in such capacity with the Lake
131 Superior & Mississippi Railroad Company in the year 1869 and 1870, 1871, along there?

A. Yes, and 1868 too.

Q. Are you familiar, Mr. Barnum, with the matter of the construction of the Lake Superior & Mississippi railroad?

A. Yes, sir.

Q. Which was afterwards know- as the St. Paul & Duluth?

A. Yes, sir.

Q. And with the matter of its construction into the city of Duluth?

A. Yes, sir.

Q. What is now the city of Duluth. Do you know the location of what is now known as Lake Avenue crossing by viaduct over the tracks on the base of Rice's Point?

A. Yes, sir.

Q. Mr. Barnum, will you tell the Court when the Lake Superior & Mississippi railroad was first constructed across Minnesota Point in this locality where it is now bridged by the viaduct?

A. Oh, I think it was about April 1869.

Q. When was the first through train from St. Paul?

A. It was in August, 1870.

Q. Whether or not prior to August 1870 trains were running upon either end or each end of the line?

132 A. Yes, sir.

Q. Are you familiar with what we call in common speech here the 200 foot strip along the bay there of the railroad where the road is constructed under the viaduct?

A. I suppose so.

Q. The point I am asking you is whether or not the road or what was then the road, was constructed in substantially the location of the present tracks there now?

A. Yes, sir.

Q. Where did they first unload and take on passengers from this end of the line?

A. There at Lake Avenue.

Q. Which side.

A. To the right of what is now Lake Avenue.

Q. In the vicinity of what is now called St. Croix Avenue?

A. Oh, no, away to the west of that; *away* to the west of the present—probably 100 feet to the west of Lake Avenue now.

Q. Oh, yes; over there?

A. Yes.

Q. And where did they have the dock to take on their freight?

A. They had a dock in the lake, at Rice's Point.

Q. But I mean in this location. That would be east, then?

133 A. East, yes.

Q. Of what is now known as Lake Avenue?

A. Yes.

Q. State to the Court whether or not material, or parts—some of the material at least for the construction of the railroad was taken on at this dock on the east of Minnesota Point.

A. Yes, sir; they unloaded a lot of iron rails there.

Q. And the construction as it was carried forward—was the material carried from this end as well as from the other, in the construction——

A. Well, it was carried from Rice's Point and here too.

Q. Was there any roadway, or traveled way, or wagon road or otherwise across these tracks in 1869 or 1870 leading to Superior Street at the place where Lake Avenue is now?

A. No, I don't think so. Farther east than that.

Q. Do you remember what the condition or nature of the ground was in that immediate locality?

A. It was swampy.

Q. Do you remember whether or not the shore, or the ground leading down from—yes, the shore along there—whether there was a declivity or not?

A. Yes, it was abrupt. At that time the only road down
134 Rice's Point——

Q. Minnesota Point, you mean?

A. Minnesota Point—oh, probably 50 or 75 feet back from the lake—a trail; that is all there was then.

Q. And there was a kind of a stucchi sidewalk on that trail there a ways, wasn't there?

A. Oh, there was one plank stretched along here and there on the driveway.

Q. Wasn't there one place in that sidewalk, Mr. Barnum, where it would give on the water as you walked over it?

A. Yes, sir, a little.

Q. And that was the way people went who lived down there, was it not, if they wanted to come up here?

A. Yes, sir.

Cross-examination.

By Mr. FESLER:

Q. Mr. Barnum, what were your particular duties in the engineering department of the railroad company at that time?

A. At just what time, Mr.——

Q. In 1869 say.

A. I was the disbursing agent of the railroad company here.

Q. During all of the year 1869?

A. Yes, sir, and 1870.

135 Q. You stated that the railroad was built in April of 1869. Of course it couldn't all be built at once.

A. It was started then.

Q. What was the beginning of it?

A. Well, of course there was the survey.

Q. You mean the survey was made then?

A. Oh no. Well, it was really located. They commenced to survey in—I joined the survey party above Oneota in September 1868, and we run a preliminary line down to the lake.

Mr. WASHBURN: By down to the lake—excuse me—do you mean east of Minnesota Point?

A. Yes, down to the lake; and after that was completed we went across to Superior and went out on the Superior road down to this side of Moose Lake and made a permanent location. This was only preliminary first. Located it all that winter until about March; we determined the final location of it by March. Then the surveyors all went down to St. Paul to write up their notes to get ready to let the contract.

Q. And you went with that body of surveyors?

A. Yes, sir.

Q. When did you come back to Duluth?

A. I came back in April.

Q. About a month after you went down to write up your notes?

136 A. Yes.

Q. And what did you find being done then with reference to that railroad, if anything?

A. Mr. Branch, the contractor, left a couple of weeks ahead of me with quite a number of men, and of course he brought up a lot of men by boat the other way here, and by the time I got here they had their camps started and the men just started at work.

Q. Where were they working?

A. Oh, all the way from the lake shore here—from Lake Avenue, say, to Oneota.

Q. Did you remain in the engineering department after you——

A. No, I was in the disbursing department.

Q. You went into the disbursing department after you came back from St. Paul?

A. Yes, sir.

Q. Were you down around the work particularly so as to know what was going on?

A. Oh yes, around every day.

Q. And when did they begin driving piles down there at the head of Minnesota Point?

A. Oh, I should think in the neighborhood of June.

Q. And when did they begin laying rails?

A. Oh, I think the first rails came up here about June.

137 Q. Do you remember how far the railroad extended before any trains were run on it across Lake Avenue, how much of a railroad had been built?

A. Oh, probably up to Oneota. They landed all the engines here at Rice's Point; then the road really commenced at Rice's Point—laid the rails at Rice's Point so they could get the engines up; but they had teams hauling the engines all the time you know; they didn't——

Q. Which side of Rice's Point was this dock on?

A. On the west side.

Q. Now, when the engines were landed there and put on the track which way did they run first?

A. Run to the base of the point.

Q. Of Rice's Point?

A. Yes.

Q. Well, you had a line down the Point. How long did they run

on Rice's Point before they run on west Oneota where you say the line extended?

A. They were running all the time, because all our material was landed at Rice's Point and over on Connor's Point; brought over on a scow. That is where we had to take originally to take it either way.

Q. As soon as the trains began running on Rice's Point
138 could they run clear through to the Second Avenue East dock?

A. Just as fast as they laid the rails they could.

Q. They laid the rails then from Rice's Point this way?

A. Yes.

Q. Now, do you remember about when the rails——

A. Of course they started that way, but we had teams hauling rails all the time; they would haul them away from Rice's Point and haul them down to the Point and haul them both ways. They were laying rails both ways.

Q. What I am trying to get at is this as to when the rails were laid between the Second Avenue, or Third Avenue East dock and Rice's Point and trains were running over that track.

A. Oh, I suppose it was probably in July.

Q. Of 1869?

A. Of 1869, yes.

Q. Do you feel very positive about these dates, Mr. Barnum, in the year 1869?

A. Oh, in a general way pretty close; can't get it down to date at all.

Q. Now, getting back to the portion of your testimony with reference to when Lake Avenue was opened up, or was crossed by persons or teams—either foot passage or team passage; When
139 do you think that was?

A. Oh, I don't know; it was some time in the summer of 1869.

Q. That they began passing on Lake Avenue up and down Minnesota Point.

A. I don't know how far down the Point they went they didn't have teams.

Q. But they went across where the railroad was being built?

A. Well, they had to cross the railroad, yes; but it was down farther towards St. Croix Avenue, not where Lake Avenue is located just now.

Q. Well, that was my question. When did they begin passing——

A. Oh, I don't know when; some time in the summer.

Q. Of 1869?

A. Of 1869.

Q. Then this abrupt——

A. I don't know when it was located by the city, you know. There was nothing but a cowpath on Superior street, and nothing but regular trails all around; no particular—any way you could get down the easiest way.

Q. Then there was one of those trails that went down on the Point from Superior street where Lake Avenue is now located?

A. No, sir, it was away east of that.

140 Q. I ask you this question, Mr. Barnum: When was Lake Avenue as at present located——

A. I told you; I answered that. I said some time about July; some time in the summer of 1869.

Q. Yes. Well, that is what I understood.

By the COURT:

Q. Well, Mr. Barnum, you mean to say, do you, that in 1869—July—they made use of that strip now known as Lake Avenue for traveling up and down the same?

A. Why, I said in the summer; I thought about July.

Q. Well, you mean to say where Lake Avenue is now?

A. No, I won't say that. It is right in that neighborhood. I don't know just when the village commenced to do anything there. They may have commenced—I think they—I am quite sure the road was east of Lake Avenue, the only road we had to go down that way; in fact there wasn't much to do there until the canal was cut through; there wasn't much traffic anyway for teams.

MAURICE L. GLADSON, called as a witness on behalf of the respondent, having been first duly sworn, testified as follows:

Direct examination.

By Mr. BAILEY:

141 Q. Your full name?

A. Maurice L. Gladson.

Q. What is your business?

A. Locomotive engineer.

Q. How long have you been engaged in that business?

A. Since 1873; 32 years or better.

Q. And during that time what companies have you worked for?

A. I worked for the Lake Superior & Mississippi, St. Paul & Duluth—at the present time Northern Pacific—all on the same road all the time.

Q. Working for the same road all the time?

A. Yes.

Q. And prior to 1873 what were you doing?

A. I was firing and working—I commenced working for the Lake Superior & Mississippi Railroad Company in 1870.

Q. What time in 1870?

A. Well, it was somewhere near the middle of May; I couldn't say exactly the date; somewhere near the 18th; I think the 18th of May.

Q. And you were continuously employed until the time you became an engineer in 1873?

A. Yes, sir.

Q. At what point were you employed when you first went to work in May——

142 A. At Rice's Point; I was located there.
Q. Had you just come to Duluth at that time?
A. Yes, sir.
Q. That was your first trip to Duluth?
A. Yes, sir.
Q. When you came here at that time was the road constructed across what is now Lake Avenue, where the Lake Avenue viaduct is?
A. Yes, sir.
Q. And cars running——
A. Yes, sir.
Q. —or engines running thereon?
A. Yes, sir.
Q. Construction trains.
A. Yes, sir.
Q. How far east did they run?
A. They ran down as far as where the elevator—the first elevator—was built there.
Q. Where what?
A. They ran down as far as where the first elevator was built here; I don't know what street it is.
Q. Second or Third Avenue East?
A. Yes; the first elevator was built—the tracks ran down to that.
Q. Was there a dock there along Second or Third Avenue East at that time, on the Lake shore?
A. Yes, sir.
143 Q. They ran down to that, did they?
A. They ran on Lake, yes.
Q. Do you know whether any of the rails which were used for the construction of the line further west were unloaded at that dock and taken along the line of railway?
A. I don't think there was any there. I think they were all unloaded down to Rice's Point.
Q. As far as you know?
A. As far as I know the only rails I ever seen unloaded there were for the Northern Pacific, after they commenced construction.
Q. Were the tracks of the Lake Superior & Mississippi at the same point which the tracks of the Northern Pacific now are as they crossed Lake Avenue?
A. Yes sir.
Q. Was there any travel up and down Lake Avenue—that is, I mean team travel or foot travel, at that time, or was it a swamp?
A. No sir.
Q. What was the condition of the surface of the ground at that time, or surface?
A. It was swampy; water and mud and one thing and another.
Q. How was the track built through there? Was it on an embankment or was it on piles?
A. Well, it was on piling; that is, through the mud there
144 till it struck the base of Minnesota Point.
Q. Do you know what the condition of the ground up near Superior street was, whether there was an embankment there or that is where Lake Avenue now is, I mean, at that time?

A. I think there was up by Superior street, was at that time, as far as I——

No cross-examination.

R. C. MITCHELL resumed the stand.

Recross-examination continued.

The COURT: I think the inquiry was, Mr. Mitchell, whether you could state to us the date at or about which Lake Avenue crossed the railroad right-of-way as first used for travel by the public.

A. I would state as explanatory here that my regular files of the paper were burned up when my office burned a great many years ago and the present files are not as complete because they were made up of picked-up sheets. I have no doubt that in my regular files that whole matter was taken up from week to week. I find here in my paper, the "Tribune" of July 20, 1871, the following statement in the council proceedings: (Reading) "Alderman Smith from the special committee appointed to confer with owners of lots
145 on Lake Avenue near Superior street relative to the cost of bridge asked for further time, which was granted." That bridge was a part of Lake Avenue, because that bridge was to establish the connection between Superior street down the deep declivity to about where—well, about Michigan street or a little below. As indicating the time when Lake Avenue was graded I have here a quotation from the "Minnesotan," if that is in order.

Mr. WASHBURN: We are not raising any objection. The inquiry is from the Court.

A. This is from the "Minnesotan" of July 15, '71: "The 'Tribune' of the 6th inst., nearly two weeks since, with its usual inaccuracy announced that contractor McDougal had already finished his long work of grading Lake Avenue between the railroad track and the canal. Since that premature announcement was made the contractor has been subsequently at work with a large force of men, cars and horses putting gravel upon the work, and yesterday afternoon he told us that we might now announce with truth that the job was just done and the work given into the hands of the city engineer for the final estimate. It has been a long job, commencing last fall, prosecuted only partially during the winter, resumed with vigor this spring and now altogether completed as per contract. It is
146 a fine improvement, and the contractor and his assistants deserve credit for thorough performance of their work."

By Mr. FESLER:

Q. Mr. Mitchell, what was the contractor's name?
A. McDougal; C. P. McDougal.
Q. Was that your complete answer to the Court's question?
A. Yes, sir?
Q. Have you files there, Mr. Mitchel, of about June 18, 1870—the month of June, 1870?
A. Yes, sir.

Q. Did you look through those files for some item with reference to this question that the Court asked you during this little recess that you had from the stand? You couldn't look through all of your files, of course, to find out whether you had stated anything with reference to the improvement of Lake Avenue?

A. Well, I didn't have time to look——

Q. Well, have you at any time looked through your files to find out what you could find with reference to when Lake Avenue was opened up?

A. Yes, sir.

Q. And have you any references there which will help any on this proposition?

A. Well, I have just read some of them.

147 Q. Well, have you any others earlier than that?

A. No, sir, I dont' think there were any earlier than that.

A. I find, Mr. Mitchell, the following item in the "Minnesotan" of date June 18, 1870—Have you the "Minnesotan" there?.

A. Yes, sir.

Q. With reference to Collins & Tuner having a contract to build a plank roadway and sidewalk on Lake Avenue south of Superior street for the distance of 2,000 feet across the marsh to the hard gravel of Lake Avenue on the Point. Do you find that item?

A. Yes, sir; I see an item here in regard to that.

Q. Will you please read it?

A. (Reading:) "The Lake Avenue plank road. Collins & Tuner, the builders and contractors, have, we understand, been awarded the contract to build the plank roadway and sidewalk on Lake Avenue south of Superior street for the distance of 2,000 feet across the marsh to the hard gravel of Lake Avenue on the Point. The roadway is to be 16 feet wide, built on piles, with a sidewalk *to be 16 feet wide, built on piles, with a sidewalk* eight feet in width. We think this firm will do a good job. Mr. Turner is one of the carpenters

148 who came here early in 1869 with Mr. William Branch and is a good workman. Mr. Collins is a mechanic, in so far as in Duluth he was the chief carpenter on the Clark house, and to him was due whatever excellent work it contains. We are glad these gentlemen are entrusted with the job of elevating Duluth out of the swamp. They are the men to do it well.

Q. Do you remember what became of that contract, or have you any present recollection of it at all?

A. Well, I simply remember that they didn't complete it.

Q. Do you remember that there was such a contract, or are you satisfied from that refreshing of your recollection that there was such a contract?

Mr. WASHBURN: If the Court please, I think that is hardly fair. Of course we are not objecting to anything Mr. Mitchell can testify to—what he did, but it strikes me that is getting pretty far over the line.

The COURT: Well, if it were not followed up by showing what was done this wouldn't amount to anything, perhaps; but it is cross-

examination, and as a foundation for further inquiry I think it may be asked.

(Question read.)

149 Mr. WASHBURN: Objected to as incompetent, irrelevant, immaterial and not proper cross-examination.

The COURT: Overruled.

Exception by respondent.

A. I don't remember about the contract with these parties. I remember that there was such a contracting firm, but I know that the Lake Avenue grading was done and completed by C. P. McDougal. I remember that very distinctly.

Q. Now I will ask you, Mr. Mitchell, to turn to the files of the "Minnesotan" of October 24, 1870.

A. There is no such a date as that. There is October 22d.

Q. Have you a paging there? Is that paged? Well, the first subsequent date to October 24, 1870.

A. Well, that would October 22.

Q. Subsequent. October 29th, I presume.

—. Oh, 29th. Yes. October 29th.

Q. I wish you would look over that paper and see if you find a notice of the award of the contract to C. P. McDougal under which the work was done and the allowance of an estimate. Have you the council proceedings in that issue, Mr. Mitchell? You will find it in it I think.

A. I don't think so, Mr. Fesler; not in this—I don't see
150 any council proceedings in this number.

Q. You find no council proceedings?

A. No, sir. I am quite sure there are none.

Q. Well, just dropping that for a moment, Mr. Mitchell. Do you remember the doing of this work by Mr. McDougal?

A. Yes, sir.

Q. Do you remember where it was begun and where it was ended; that is, where did the work begin and where did it end?

A. I think he begun his work on the lower end.

Q. Well, was it built substantially at the same place where the viaduct is now?

A. Yes, sir.

Q. Well, that will be all now, Mr. Mitchell; but I wish you would see if you cannot find an item in there with reference to the McDougal contract. The first estimate was allowed on November 24th, 1870, according to my memorandum, and I think you will find it there somewheres. That will be all.

(Witness withdraws for the present.)

B. F. HOWARD called as a witness on behalf of the respondent, having been first duly sworn, testified as follows:

Direct examination.

By Mr. BAILEY:

151 Q. Mr. Howard, how long have you lived in Duluth?

A. I moved to the head of the lakes with my parents in 1852 and moved over to Duluth in the fall of 1868; that is, my folks didn't but I did.

Q. What is that?

A. I moved over with my brother in the fall of 1868.

Q. And you have lived here ever since?

A. No, sir.

Q. Well, you did live here from 1868 how long?

A. Until late in November, 1872.

Q. Where did you live?

A. I lived on Minnesota Point.

Q. During that time?

A. Down near where that schoolhouse is built there.

Q. Down near the Webster school?

A. I don't know what the name of it is.

Mr. WASHBURN: The brick schoolhouse this side of the canal?

A. The house stands right this side of that schoolhouse.

Q. Were you frequently back and forth up to Minnesota Point and up towards Superior street during those years?

A. Yes, sir.

152 Q. You were familiar with the locality where the Lake Avenue viaduct crossing the Northern Pacific tracks now is?

A. Yes, sir.

Q. Was there any travel along what is now Lake Avenue during the years of 1869 and 1870?

A. No, sir, there was not.

Q. What was the condition of the surface at that point?

A. Swamp; a deep swamp.

Q. How is that?

A. A swamp that would come up about where the St. Paul & Duluth No. 1 slip is now. You could come up there almost to Lake Avenue with a boat.

Q. Calling your attention to the plat of Central Division of Duluth which has been introduced in evidence, can you tell by referring to that plat—explain to the Court—just what the situation there was with reference to being swamp or high land?

A. I don't understand that plat very good. That is Lake Avenue and that is Superior street? That is more like it lays now.

Q. Well, extending from Superior street.

A. I have got it now. Now you want to know how this was in eighteen hundred and when?

Q. In 1869 and 1870, right along here.

A. Right along here?

153 Q. Here is the railroad right-of-way here. Now what was the condition of the surface being swamp?

A. All swamp.

Q. How far down did this swamp extend?

A. The swamp extended away down here (indicating).

A. Down nearly to——

A. Down to Jake Leidel's corner. It was right in here, I think (indicating).

Mr. WASHBURN: Locate the "here" on the map, Mr. Bailey, so it will be on the record.

Q. The point that you are referring to is the northerly point of the lowest platted portion that appears on this map?

A. It is away down here (indicating). Ain't that called the additional line? If that is it then I locate by that.

Q. Just below——

A. Just below Cowles' Addition line; then it used to come up this way and come up here and go up First Avenue East right up here.

Q. Now you are pointing almost in a straight line from what you refer to as Cowles' Addition just below the point marked "Minnesota Point" and running up to First Avenue East.

A. Yes, sir, used to go up First Avenue East.

154 Q. There was no travel, you say, along Lake Avenue?

A. Well, there was all along—there was some houses built right up along about in to about here somewhere, but they wasn't out to the line of Lake Avenue. Then there was a sidewalk built on kind of sticks grown into the mud and plank on, and you would walk on them and get your feet wet.

Q. Then you say there was some travel on Lake Avenue just above—a block or so—Cowles' Addition.

A. Yes, and turned in like that way and then come off in here and went up (indicating).

Q. By saying "come off in here and went up" you are referring to First Avenue East?

A. Yes, sir; come ashore again.

Q. Now just below the junction of what is now Lake Avenue and Superior street what was the character of the surface there?

A. It was an enbankment; steep.

Q. A steep embankment?

A. Yes sir.

Q. Do you remember when the first train went through from St. Paul to Duluth?

A. I don't remember the time; I remember it was 1870; some time in the middle of summer, I think, 1870.

Q. And whether or not the tracks of the Lake Superior & Mississippi across Lake Avenue about where the Northern Pacific
155 tracks are now located had been constructed and laid there sometime before the first train went there?

A. Yes sir. There were trains running to the outside dock in 1869.

Q. By the outside dock you refer to the dock over——

A. Under the break-water. There was a breakwater out there.
Q. By the dock you refer to the dock over on the lake shore and between Second and Third Avenue East?
A. Between Second and Third Avenue East.
Q. You say trains were running over there in 1869?
A. Yes sir.

Cross-examination.

By Mr. FESLER:

Q. Mr. Howard, you have mentioned Jake Leidel's place. From there how far southward on Lake Avenue were houses built?
A. What?
Q. From where Jake Leidel's place——
A. How far south did we live?
Q. No; how far south were houses built?
A. Oh, they were built clear down to where the canal is.
Q. To where the canal is?
156 A. Yes. I guess there were probably some—My recollection is when they dug the canal they destroyed some houses there.
Q. There were houses on either side of where Lake Avenue is now from Jake Leidel's——
A. Well, I know there was on the east side at that time, because I know Dr. Foster had a house——
Q. But south of Jake Leidel's place?
A. South of Jake Leidel's place, on the east side of Lake Avenue.
Q. And south of Jake Leidel's place on Lake Avenue as at present traveled was traveled then?
A. Part of it, yes, sir.
Q. South of Jake Leidel's place?
A. South of Jake Leidel's place.
Q. Anyone that lived on Lake Avenue south, say between the canal where it is now and Jake Leidel's place, came up Lake Avenue, or could come up there, and then they would veer off to the right around toward the Hays block?
A. Yes sir.
Q. The Hays block being at First Avenue East and Superior street?
A. Yes sir.
Q. And that lower part of Lake Avenue below Jake Leidel's place was a traveled street at that time?
157 A. Yes sir.
Q. Used for street and sidewalk purposes?
A. Yes sir.

Redirect examination.

By Mr. BAILEY:

Q. All that portion of Cowles' Addition or below that, that is further down——
A. South, below.

Recross examination.

By Mr. FESLER:

Q. But this sidewalk that you testified as teetering—getting your feet wet, and so forth—that was north of the north line of Cowles' Addition a little bit?

A. That was north of Jake Leidel's and kind of—buildings built along the edge—what would be the west side of the edge of Minnesota Point at that time. In order to get in front of that place they kind of—I don't think it ever ran on Lake Avenue; it was in further, in east.

Re-redirect examination.

By Mr. BAILEY:

Q. Do you know when the grading of Lake Avenue was done, what year, when the canal was opened up?

A. When Lake Avenue was completed?

Q. Yes.

A. So that they could travel on it? 1871.

158 The COURT: That is up to Superior street; open through up to Superior street?

A. Yes, sir.

Re-recross-examination.

By Mr. FESLER:

Q. What time in 1871 would you say, Mr. Howard?

A. I can't tell you exactly. I was sailing that summer and I remember they got it done along in the summer time, 1871—so that you could get through.

J. D. HOWARD, called as a witness on behalf of the respondent, having been first duly sworn, testified as follows:

Direct examination.

By Mr. BAILEY:

Q. Mr. Howard, how long have you been in Duluth?

A. 36 years, I think.

Q. What year did you come here?

A. Came here in 1869.

Q. What portion of the city did you locate in when you first came?

A. We lived on the lake shore, right this side of Moss street.

Q. That is just——

A. About a block and a half this side of the canal.

159 Q. You are a brother to Mr. B. F. Howard who has just been on the stand?

A. Yes sir.

Q. Lived at the same place?

A. Lived at the same place, yes sir.

Q. Were you frequently up and down Minnesota Point from the place where you lived to Superior street?
A. I was.
Q. During the years immediately following 1868?
A. Yes sir.
Q. You lived there continuously for how many years after 1868?
A. Why——
Q. Well, about six? That is all——
A. 15 or 20 years, something like that.
Q. Was there any travel on what is now called Lake Avenue below Superior street—from Superior street down to about Cowles' Addition, in the years 1869 and 1870?
A. No sir, there was not.
Q. What was the character of the surface at those points?
A. It was water and swamp.
Q. What was the condition of the ground just below, or just below Superior street and on what is now Lake Avenue, during those years?
160 A. Just below Superior street there was quite a steep bank there—clay bank; then they went down into the swamp, probably about Michigan street or just—well, just about Michigan street would be the swamp.
Q. And from there on it was swamp——
A. From there on down to Cowles' Addition it was swamp and water.
Q. Do you remember when the first train from St. Paul to Duluth came in over the Lake Superior & Mississippi?
A. It was in 1870.
Q. Do you remember the exact time?
A. I don't remember as I remember the exact date. Of course I have heard it testified to here, but——
Q. Do you know how long before that the road across what is now Lake Avenue had been opened up; that is, the railroad, I mean?
A. I should think it had been opened up—I think it was opened up the fall before, if I remember.
Q. You are speaking of the railroad?
A. Of the railroad, yes, sir.
Q. How was that built at the point where Lake Avenue now crosses it?
A. It was built on piling, as I remember.
161 Q. Do you know how long after that it was filled in?
A. Why, at Lake Avenue it was filled in in the spring of 1871.
Q. That is the railroad?
A. At the railway, yes, sir; the Lake Avenue crossing.
Q. When the railroad was first put through there how far east of it did it extend?
A. It went to what we call the outside docks out to about Third Avenue East.
Q. Do you know whether any of the railroad rails were brought

*into that dock and taken over and taken over* the line to points further west or not.

A. I think they were; I am pretty sure they were.

Cross-examination.

By Mr. FESLER:

Q. Mr. Howard, you say that Lake Avenue was filled in in the spring of 1871?

A. I say it was finished in the spring of 1871. They commenced that improvement in the fall of 1870 and worked on it all winter. They took the filling that went into Lake Avenue out of the canal, started in at the lower end and filled up, came up to Superior street.

Q. That is, the present canal, was first opened up in the
162 winter of 1870 and 1871?

A. 1869 and 1870, when I was first—they started the canal, if I remember—and I think I am right on it—in the fall of 1869 and they had it dug through before they commenced on filling Lake Avenue, and then in deepening it, in widening the canal, they took the filling from it and filled Lake Avenue.

Q. And they began filling Lake Avenue where it is now located with dirt from the canal in the fall of 1870?

A. I think so, yes, sir.

Q. And continued to fill through the winter; so that by the spring of 1871 they had filled up a roadway clear from what your brother calls Jake Leidel's place to Superior street?

A. Yes, sir; I think that is right.

Q. And from the time that it was so filled it was used as a traveled way by the public?

A. Yes, sir.

Mr. WASHBURN: I want to offer in evidence the stipulation or agreement between the City of Duluth and certain property owners, pertaining to the improvement to the approach to this viaduct and relating to this proceeding to enforce the railway companies to build the same, the same being produced by request by the relator.

(Said paper was marked by the reporter "Resp. Ex. 1.)

163 Mr. FESLER: The offer is objected to as incompetent, irrelevant, immaterial and not within the issues in the action.

The COURT: It may be received.

Excepted by relator.

Respondent rests.

R. C. MITCHELL resumed the stand.

Recross-examination continued.

By Mr. FESLER:

Q. Have you found the record in the paper which you were reading from early in your testimony of anything in the council proceedings with reference to the McDougal contract?

A. Yes, sir.

Q. Those council proceedings are of what date?
A. Of October 24th, 1870.
Q. And published in your newspaper of October 26, 1870?
A. Yes, sir.
Q. Will you please read the item in the paper, in the council proceedings, with reference to this contract?

A. (Reading:) "The contract between the street commis-
164 sioner and C. P. McDougal for the grading Lake Avenue was approved.

Q. That is all.

It is stipulated by the attorneys that Luther Mendenhall, the witness already sworn in the case, would testify, if called upon to do so, that the Western Land Association was not a creature of the Lake Superior & Mississippi Railroad Company, as testified to by the witness C. H. Graves, but was an entire and distinct entity as far as the legal statutes of that company and the railroad company is concerned, and had other interests outside of the land dealings with the railroad company; and that if the railroad company was in possession of the strip in question under any agreement with the Western Land Association such arrangement was no other or different from that which would be indicated by the resolutions referred to in the testimony of the witness Graves and set out in full in the stipulation of facts offered by the respondent; and also that from May, 1871—the date fixed by the witness J. D. Howard as the time when Lake Avenue first became a traveled way open to the public—until the present time Lake Avenue at the point in question had been continuously a traveled way, open to the public.

165–167 Mr. Washburn: The respondent will admit that Mr. Mendenhall would so testify if present.

Relator rests.

Case closed.

(In the settled case here follows plans and specifications prepared by city engineer about year 1891 which were made in pursuance of the councils resolution demanding that the St. Paul and Duluth Railroad Company build a viaduct and which the company refused to build.)

Respondent's Ex. 1.

168 State of Minnesota, *County of St. Louis:*

District Court, Eleventh Judicial District.

In the matter of the assessment to defray in part the expense of paving Lake Avenue, from the viaduct over the Northern Pacific Railway Company's tracks, to the Government property adjacent to the ship canal.

It is stipulated, between the parties appealing from the confirmation of assessment in the above entitled proceeding, and the City of Duluth, through their respective attorneys, as follows:

I. The City of Duluth shall immediately institute proceedings to compel the Railroad Companies owning the railroad right-of-way crossing Lake Avenue in the City of Duluth, to pay the expense of repairing and maintaining the Lake Avenue viaduct and its approaches in said city, from Superior Street to Sutphin Street, and shall take such steps to that end as may be deemed expedient, and shall continue the same until the said viaduct and its approaches are repaired at the expense of said Railroad Companies, or
169 until it is finally determined by the proper court that said Railroad Companies are or are not liable for such expense of maintenance.

II. Hearing upon this appeal shall not be had until the matters referred to in the foregoing paragraph are disposed of, either by said viaduct and its approaches being repaired at the expense of said Railroad Companies or by a final determination in a proper court as to the liability of said companies to maintain such viaduct and its approaches.

III. In the event that the improvement for which this assessment is levied, in front of the property involved in this appeal, or any other improvement which may be accepted in lieu thereof by the City of Duluth, is paid for by said Companies under any agreement between them and the City, without a final determination of the liability of said Companies, then the court shall enter judgment herein annulling the assessments appealed from, without costs or disbursements to either party.

IV. In the event that is it finally determined in the proceedings to be instituted for that purpose, that said Railroad Companies are liable for the repairs and maintenance of the southerly approach to said viaduct,—being that portion in front of the property involved in this appeal,—then the court shall enter judgment herein
170 annulling the assessments appealed from, without costs or disbursements to either party.

V. In the event that it is finally determined in the proceedings to be instituted for that purpose that said *aR*ilroad Companies are not liable for the repair and maintenance of any portion of the southerly approach to said viaduct,—being that portion in front of the property involved in this appeal,—then the court shall enter judgment herein confirming the assessment appealed from, in the amount of the original assessment, without penalties, costs or interest.

VI. In the event that it should be finally determined in the proceedings to be instituted for that purpose, that said Railroad Companies are liable for the repair and maintenance of a portion of said southerly approach of said viaduct, but not liable for the balance, then the assessment herein appealed from shall be annulled as provided in paragraph IV hereof as to all property abutting upon that portion of said southerly approach which it is determined the Railroad Companies are liable for the repair and maintenance of, and the assessments herein appealed from shall be affirmed as provided in paragraph V hereof as to all property abutting upon that portion of said southerly approach which it is determined said Railroad

Companies are not liable for the repair and maintenance
171 of.

VII. It is further agreed that until the final determination, as herein provided for, of the question of the liability of the Railroad Companies to repair and maintain said southerly approach, the City will not attempt to repair the same at the expense of the abutting property owners; but that the City, by is proper officers, shall, under the petition that has been presented to the Common Council, cause the improvement petitioned for to be made, from the northerly side of Sutphin street to the ship canal, during the present season if that be practical or possible, and shall cause it to be done under a separate contract; and that the city shall have the right and power, in case it is determined that said Railroad Companies are not liable for the repair and maintenance of said approach, or any portion thereof as it is finally determined the Railroad Companies are not liable to repair and maintain, to be improved as called for in the petition that has heretofore been presented to the Common Council, in a separate contract, which may be let at any time after the question of such liability has been finally determined.

In witness whereof, the parties to this stipulation have caused their respective names to be attached; the City of Duluth by its attorney authorized by its Common Council, each of the parties
172 appellant in these proceedings by his or its attorney herein, and each of the parties appellant has set opposite his or its name, the property owned by him or it, against which the assessment is sought to be levied in these proceedings, and which property is intended to be bound by this stipulation.

Dated, Duluth, Minn., July 15th, A. D. 1903.

CITY OF DULUTH,
By OSCAR MITCHELL, *Attorney.*

Southerly 50 feet of Lot 2 in block 2.
Industrial Division of Duluth.
DULUTH BETHEL ASSOCIATION,

All of Lot 2 in Block 2, except the southerly 50 feet.
Also Lots 4, 6 and 8, all in block 2, Industrial Division of Duluth.
WESTERN LAND ASSOCIATION
OF MINNESOTA,

Northerly half of Lot 10 in block 2, Industrial Division of Duluth.
THE MIDLAND COMPANY,
All by J. B. RICHARDS, *Attorney.*

Southerly half of Lot 10, in block 2, Industrial Division of Duluth.
AUGUST STALBUSCH,

Northerly half of Lot 14, and the southerly 1 foot of Lot 15, in Transfer Division of Duluth.

173 Estate of E. A. Liedel, deceased,
All by M. DOUGLAS, *Attorney.*

Northerly half of Lot 15, and the southerly half of Lot 16, Transfer Division of Duluth.

GEORGE B. ORR,
R. J. WEYMISS (*Trustee*),
ALICE M. SCOTT,
GEORGE B. ORR (*Trustee*),

The Northerly 49 feet of the southerly 50 feet of Lot 15, Transfer Division of Duluth.

NATHANIEL N. BETTS AND
EDWARD OVERTON,

Southerly half of Lot 14, Transfer Division of Duluth.
WILLIAM LITTLE,
All by W. G. JOERNES, *Attorney.*

North ½ (except R. R. right of way) of lot 16, Lake Avenue, Transfer Division of Duluth.

ELSIE SCHOENHOFEN,
FRANCIS W. SULLIVAN, *Attorney.*

Filed in my office at — — o'clock — — Nov. 2, 1905.
J. P. JOHNSON,
*Clerk District* Clerk.
By V. A. DASH, *Deputy.*

Certain of the exhibits are not set forth herein in full. The exhibits introduced in evidence, or blue prints of such exhibits as are maps, may be attached hereto and certified and sent to the Supreme Court as a part of this case, in case either party so desires.
174 The exhibits which may be so attached and certified and which are not herein set forth in full are as follows:

From the Office of the Register of Deeds.

1. D. of Deeds, page 286, being the deed to the Western Land Association under which it became the owner of the land at the place in question;

2. A. of Agreements, page 230, being a power of attorney from Western Land Association to Luther Mendenhall, dated June 19, 1869.

3. A. of Plats, pages 9 and 10, together with the certificates, being the plat of Upper Duluth;

4. A. of Plats, page 12, including copy of certificates, being the plat of Cowell's Addition;

5. A. of Plats, pages 97 and 98, including map and writings contained on said pages, being plat of Duluth Proper, First Division.

6. A. of Plats pages 116 and 117, including the map and writings on both pages, being plat of Central Division of Duluth.

7. A. of Plats, pages 128, 129 and 130 including map and the writings of said pages, being plat of Commerce Division of Duluth;

8. K. of Deeds, pages 325 to 328, being deed from Western Land Association to Lake Superior and Mississippi Railway Company, mentioned in the alternative writ.

175 9. K. of Deeds pages 330 and 331, being deed from Lake Superior & Mississippi Railway Company to Thompson and Moorhead, Trustees;

10. Also pages 27 and 43 of Roe's Atlas, being an atlas of the City of Duluth.

11. Also the petition, plat and award of commsisioners in File No. 16 from the office of the Clerk of the District Court, being the condemnation proceedings of the Lake Superior & Mississippi Railway Company.

12. Also certain blue prints attached to the original plans and specifications hereinabove set forth.

The foregoing having been found to contain the evidence introduced on the trial of the above entitled action, the objections taken by counsel thereto, the rulings of the court thereon and the exceptions taken by counsel thereto, and all proceedings had upon the trial of said action, the same is hereby settled and allowed as a settled case herein, except that certain of the exhibits are not set forth herein in full, as above stated, but may be attached hereto and certified and sent to the Supreme Court as a part of this case should either party so desire.

Dated, March 3, 1906.

WILLIAM A. CONT, *Judge.*

176 STATE OF MINNESOTA, *County of St. Louis:*

District Court, Eleventh Judicial District.

THE STATE OF MINNESOTA EX REL. CITY OF DULUTH, Relator,

*vs.*

THE NORTHERN PACIFIC RAILROAD CO., a Corporation, Respondent.

The above matter came on for hearing before the above named court, at a General Term thereof, on October 30th, 1905, Bert Fesler appearing for the Relator, and C. W. Bunn, Emerson Hadley, J. L. Washburn and W. D. Bailey appearing for respondent. After hearing the evidence adduced by both parties and argument of counsel and after due consideration of the same, I make the following Findings of Fact and Conclusions of Law:

*Findings of Fact.*

1. That the City of Duluth is a Municipal corporation duly organized and existing in the County of St. Louis, Minnesota, and as such has by its charter the care, supervision and control of the highways, streets, alleys and public grounds within the limits of

177 the City of Duluth, and has power given to it by its charter to compel railroad companies to lower and bridge over their

tracks or construct viaducts over the same and keep the same in repair.

2. That The Lake Superior & Mississippi Railroad Company was a railroad corporation incorporated and chartered under Chapter 93 of the Special Laws of the Territory of Minnesota for the year 1857, and Chapter 1 of the Special Laws of the State of Minnesota for the year 1861; and by the terms of said last mentioned act and by its articles of incorporation, said Railroad Company had the right and authority to construct its railroad across any public or private road or highway within the State of Minnesota; subject, however, to the duty, obligation and liability imposed by said special act and by the laws of the State of Minnesota, and by its articles of incorporation, to put and continuously maintain such road or highway in such condition or state of repair as not to impair or interfere with its free and proper use.

3. That, by deed dated March 1, 1873, acknowledged September 29, 1873, and filed for record in the office of the register of Deeds of St. Louis County, Minnesota, January 26, 1874, the Western Land Association deeded to The Lake Superior & Mississippi Rail-
178 road Company a strip of land two hundred (200) feet in width, extending through a portion of the City of Duluth, and extending across Lake Avenue in the City of Duluth, which avenue had prior to that time, to-wit: on September 30, 1870, been platted and dedicated to the public as a public street or avenue, and accepted by the public as such. That at the time of the execution and delivery of such deed, the Western Land Association was the record owner in fee simple of said land, except said Lake Avenue and other public streets and avenues crossed by the land described in said deed; and prior thereto said Western Land Association had dedicated certain portions of said strip of land to the public for public streets, which dedication included what was then and is still known as Lake Avenue in the City of Duluth, which avenues was so dedicated on September 30, 1870, as aforesaid.

That said deed, after describing the property conveyed, contained the following provisions, to-wit:

"To Have and to Hold the same, together with the hereditaments and appurtenances thereunto belonging or in any wise appertaining to the said party of the second part, its successors and assigns, forever.

Subject, nevertheless, to the rights of the public and of the
179 City of Duluth in and to those portions of any of the above described property that have been heretofore dedicated to public streets, avenues or alleys."

That said deed was duly accepted by The Lake Superior & Mississippi Railroad Company.

4. That The St. Paul & Duluth Railroad Company was incorporated and organized under and pursuant to the provisions of Chapter 30 of the General Laws of the State of Minnesota for the year 1876; and thereafter and on or about July 17th, 1877, it became the owner by purchase, of all of the property, rights, franchises and

privileges of The Lake Superior & Mississippi Railroad Company; and the said St. Paul & Duluth Railroad Company thereupon became subject to all of the duties, obligations and liabilities of the said Lake Superior & Mississippi Railroad Company, including its duty, obligation and liability to put and continuously maintain Lake Avenue in the City of Duluth in such condition and state of repair as not to impair or interfere with its free and proper use for travel over or along said Lake Avenue; and said St. Paul & Duluth Railroad Company was by the laws of the State of Minnesota, independent of the obligations theretofore existing on the part of The Lake Superior & Mississippi Railroad Company, charged with the duty, obligation and liability to put and continuously maintain said Lake Avenue at the place of its intersection with the right-of-way of said Lake Superior & Mississippi Railroad Company, acquired by said St. Paul & Duluth Railroad Company, in such condition and state of repair as not to impair or interfere with its free and proper use for travel over and along said Lake Avenue.

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5. The Lake Superior & Mississippi Railroad Company laid its first railroad track across Lake Avenue aforesaid at its intersection with its right-of-way aforesaid, in 1869, which track has been continuously renewed and maintained ever since, and has since said time laid additional tracks at such point of intersection until in the year 1891 at least three such tracks had been so laid and at the time of the commencement of this proceeding at least five such tracks had been so laid, with a large number of spur tracks or switches at all said times leading into the same at or near the said point of intersection. Said first track aforesaid was so laid pursuant to some agreement with the Western Land Association the precise terms of which are not disclosed by the evidence.

6. Lake Avenue at said point of intersection was first used as a public traveled way in the autumn of 1870 or the spring of 1871, and has ever since been so used and maintained, and at all times since has been one of the main traveled highways of the City of Duluth. During all of said time said railroad tracks were constructed and maintained at the natural grade of said avenue, as it existed prior to the construction of the viaduct hereinafter mentioned, and said avenue was maintained as an avenue and street of said city for public travel thereon, at the natural grade thereof, from the beginning of its use as a public street until the completion of said viaduct.

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7. That after the incorporation of the said St. Paul & Duluth Railroad Company and after it had acquired the title of The Lake Superior & Mississippi Railroad Company in and to the right-of-way abutting upon said Lake Avenue, and after the construction of the tracks along said right-of-way and across said avenue by said railroad companies as aforesaid, the travel on said avenue by the public became so great, and the passage of teams and of people in going to and fro along said avenue was so great, and the amount of business done by said St. Paul & Duluth Railroad Company on its

tracks so laid across said avenue as aforesaid was so great, and the passage of cars and engines and of trains of cars along said tracks was so frequent that the safety of the public, the preservation of said avenue as a highway, and the maintenance of the same
182 in such condition and state of repair as not to impair or interfere with its free and proper use and not to impair its usefulness as a highway, required the construction of a viaduct on Lake Avenue and over the tracks of said St. Paul & Duluth Railroad Company, in order to carry said avenue or street over said tracks; and the said St. Paul & Duluth Railroad Company and the City of Duluth having agreed that there was a public necessity for the construction of such viaduct, on September 22, 1891, plans and specifications of such a viaduct were agreed upon between the City of Duluth and the St. Paul & Duluth Railroad Company, and a viaduct in accordance therewith was so constructed during the years 1891 and 1892. Such viaduct, including approaches, was to be somewhat over 1,000 feet in length. By the agreement then made between the City and the Railroad Company, the latter bound itself to contribute $50,000 towards the cost of the viaduct and approaches, and the City undertook to construct the same, to contribute whatever additional amount was necessary to fully pay therefor, to maintain the portion of said viaduct comprised within the limits of said right-of-way for fifteen years after the completion thereof; and to maintain the remaining portions of said viaduct (something over 800 feet in length) forever. The question of who should
183 maintain that portion of the viaduct within the limits of the right-of-way after the lapse of fifteen years was left open. The City also agreed that the natural surface of the street at the place of the crossing should never again be used for travel. Such viaduct was constructed in accordance with such agreement and each party performed the part by it agreed to be performed. The cost to the City of the original construction, over and above the $50,000 contributed by the Railroad Company, was in excess of $23,000. Such viaduct has ever since been the sole means of passage for the public along and with the lines of said avenue, where the same is crossed by the tracks of said Railway Company. Said viaduct and approaches became necessary wholly by reason of the construction of the tracks of said Company and of its predecessor in title across said Lake Avenue; and the amount of business done on said tracks and the amount of travel on said Lake Avenue rendered a surface crossing at said point dangerous and unsafe to the public.

8. That The Northern Pacific Railway Company is a corporation, organized and incorporated under the laws of the State of Wisconsin, and authorized to do business within the state of Minnesota and operating a line of railroad within the State of Minnesota,
184 passing through a portion of the City *operating a line of railroad within the State of Minnesota, passing through a portion of the City* of Duluth. That on or about the 15th day of June, 1900, said Northern Pacific Railway Company purchased the charter, franchises and all of the property of The St. Paul & Duluth

Railroad Company, including the right-of-way abutting upon Lake Avenue in the City of Duluth, hereinbefore described.

9. That the said respondent company has wholly failed and neglected to maintain and keep in repair said viaduct and its approaches so constructed as aforesaid, which said viaduct and approaches are now and were at the commencement of this action out of repair, and out of repair to such an extent that the same are unsafe and dangerous for travel; and there is no means provided for the passage along said avenue of the public other than the said viaduct and approaches. That, at the time of the commencement of this proceeding and ever since, the floor or roadway of said viaduct and approaches and the pavement thereon were and have been worn out and in need of replacement, the iron work thereof was and has been rusty and the paint thereon scaled off, and said iron work was and has been in need of cleaning and repainting; and all such repairs should be done in accordance with the plans and specifi-
185 cations therefor, copies of which are attached to the petition of relator herein marked Exhibit B.

10. That the said plans and specifications for the repairs to said viaduct and approaches were prepared by the City Engineer of the City of Duluth, in pursuance of proper instructions of the Common Council of Duluth, and the same are necessary, reasonable and practicable for the repair of said viaduct and approaches; and said plans and specifications were duly adopted and approved by the Common Council of the City of Duluth and said City duly demanded that said respondent company should proceed to repair said viaduct and approaches in accordance with said plans and specifications, which said company has wholly refused to do.

11. That the said viaduct so constructed as aforesaid was built at the lowest practicable height over the tracks of the railroad companies across said avenue, and the approaches of said viaduct in said avenue leading from the lines of the right-of-way of said respondent company are of as steep a slope and the said viaduct and its approaches which are a part thereof are as short as it — practicable or safe to make them.

12. That said Lake Avenue is a street that is in constant use by the citizens of Duluth and by the public generally, and the
186 people are constantly passing over the same, and it is necessary that the same should be kept open and maintained as a public street or avenue of the city for the use of the citizens thereof and the public generally.

13. That said City has no plain, speedy or adequate remedy with respect to the matters set forth in the petition herein, in the ordinary and usual course of law.

14. That the respondent would have a reasonable time within which to make the repairs referred to herein if the same should be ordered made before June 1, 1906.

*Conclusions of Law.*

1. That said Relator is entitled to judgment adjudging that a peremptory writ of mandamus issue forthwith commanding and directing said Respondent, The Northern Pacific Railway Company, to make the repairs described in and in accordance with the plans and specifications therefor which are set forth in the paper marked Exhibit B attached to the alternative writ herein, except repairing and re-laying the sidewalk on the viaduct approaches, the re-setting of curbing on the viaduct approaches, and the paving of the roadway of the approaches, and further commanding and directing said Respondent to proceed with such repairs with all reasonable
187 dispatch and diligence and to complete the same by June 1, 1906.

2. That said Relator is entitled to judgment against said Respondent for its costs and disbursements herein.

Let judgment be entered accordingly after twenty days from the date hereof, for which period entry of judgment herein is stayed.

By the Court:

WM. A. CANT,
*Judge of said Court.*

Dated February 2, 1906.

STATE OF MINNESOTA, *County of St. Louis:*

District Court, Eleventh Judicial District.

STATE OF MINNESOTA *ex Rel.* CITY OF DULUTH, Relator,
*vs.*
NORTHERN PACIFIC RAILWAY COMPANY Respondent.

*Memorandum.*

A railroad track was laid at the point in question in 1869 and has been continuously renewed and maintained since that
188 time. Such track was so laid pursuant to some agreement with the owners of the land upon which it was laid, the precise terms of which agreement are not disclosed. Lake Avenue as laid out across the railroad right-of-way was, in my opinion, first dedicated to public use by the plat of Central Division of Duluth filed for record September 30, 1870. It was first used as a traveled way in the autumn of 1870 or the spring of 1871. In 1891 travel at the point of the crossing in question had become so great and the operation of trains so frequent that the safety of the public required the construction of a viaduct on Lake Avenue over the railway tracks then crossing the same. On September 22nd of that year the plans and specifications of such a viaduct were agreed upon between the City of Duluth and the Railway Company then operating the line of railway in question. Such viaduct, including approaches, was to be somewhat over 1,000 feet in length. The right-of-way of the company so crossed was 200 feet in width. By such agreement the

Railway Company bound itself to contribute $50,000 towards the cost of the viaduct and approaches, and the city undertook to construct the same, to contribute whatever additional amount was necessary to fully pay therefor, to maintain the portion of said viaduct comprised within the limits of said right-of-way (200 feet)
189 for fifteen years after the completion thereof, and to maintain the remaining portions of said viaduct (something over 800 feet in length) forever. The question of who should maintain that portion of the viaduct within the limits of the railway right-of-way after the lapse of fifteen years was apparently left open. By the contract the city also agreed that the natural surface of the street at the place of the crossing should never again be used for travel no matter how changed the conditions or what the exigencies might be. The viaduct was constructed in accordance with such agreement and each party performed the part by it agreed to be performed. The viaduct is now in need of repairs and the relator City, believing that it has the right, notwithstanding said agreement, has instituted this proceeding to compel the Railway Company (respondent), which has succeeded to the rights of the company originally operating the lines of railway in question, to make the needed repairs.

1. So far as the question may be material, if at all, the Railway Company, in my opinion, had priority of right over the public at the place in question, and the acceptance later of the deed ("K" of "Deeds" 325) did not operate to interfere with the effect of such priority, whatever it may be. The railway track was there of
190 right before the street was there. That is the important thing. The later acceptance of the deed referring to streets, etc., may have amounted to an acquiescence by the Railway Company in the platting of Lake Avenue across the railroad right-of-way without the Railway Company joining therein, but it did not tear up the tracks of the Company nor change the order of precedence of past events.

2. But the question of priority is, in my opinion, quite immaterial. We are concerned here not with the interpretation of a contract, but with the exercise of the police power. Section 7 of the Act incorporating the original company by which the railway in question was first constructed merely stated in part what would have been the rule whether there stated or not. The important point is that nowhere in such Act was that company relieved from any of the burdens which unless by express legislative exemption, always follow the prosecution of such enterprises.

The question after a long lapse of years is not whether the street was there a month or a day before the railroad, or whether the railroad was there a month or a day before the street; the question is whether a condition of affairs exists whereby the public safety
191 is endangered, and whether that condition has been created by the Railway Company in the prosecution of its enterprise for the attainment of its own ends. The Railway Company was and is at all times subject to the exercise of the police power by the city. It accepted its charter and began its operation with that understanding. Wholly irrespective of the question of priority

here invoked the Railway Company is bound to do whatever may reasonably be required by the City in the exercise of that power. This is clearly laid down in State *ex rel. vs.* District Court of Hennepin County, 42 Minn., 247, and in what seems to me to be many of the best considered cases throughout the country, including N. Y. & N. E. R. R. Co. *vs.* Bristol, 151 U. S. 556. Compelling a railway company to bridge a dangerous crossing is, of course, nothing more than an exercise of the police power and is everywhere so considered. It is so considered in the present charter of the City of Duluth and was likewise considered in the preceding charter which was in force when the viaduct in question was constructed. No justification is apparent for holding that these legislative concepts of police regulations are unconstitutional, and, unless so held, they are binding. The fact that a railroad has first traversed the country is not such a preemption of opportunity as will serve to forestall the
192 exercise of the police power. Roads and streets may still be laid out as before, and if in so doing a line of railway is crossed which in the course of time becomes dangerous to the public safety it may become the duty of the railway company to remove the danger by bridge or tunnel; for "this duty is founded upon the equitable principle that it was their act done in the pursuit of their own advantage which rendered this work necessary, and therefore they, and not the public, should be burdened with its expense," (State *ex rel. vs.* St. P. M. & M. Ry. Co., 35 Minn., 131-133; State *ex rel. vs.* Minnesota Transfer Ry. Co. 80 Minn., 114 and, logically, the application of this principle has no concern or connection with the question of priority here urged and considered. On principle it would seem that the only question is whether the safety of the public is endangered at a place where it has a right to be and whether such danger has been occasioned by the prosecution of the railway enterprise. If this be correct, the chance circumstance of which happened to be there first years ago—the railroad or the street—when neither one interfered in any substantial degree with the use of the other is of little concern.

It is true that in the concluding words of the opinion in State *ex rel. vs.* St. P. M. & M. Ry. Co., 35 Minn., 131, 140 Mr. Justice Mitchell guardedly limits the construction which the Court
193 there placed upon a particular statute to cases where a railroad has been constructed in a street previously opened for travel, and that the question of priority has several times since been adverted to in decisions of the Supreme Court; but, as contended by counsel for relator, the precise point, here involved has never been directly decided in this State, though the principle was discussed at length and fully recognized in State *ex rel. vs.* District Court of Hennepin County, 42 Minn., 247-249, *et seq.*, and cases there cited. In the case of the Garfield Avenue viaduct, tried in this court, where the respondent here was also a respondent, Judge Ensign, relying upon the case last cited held that the priority of the railway company at the place in question was of no avail and that it was bound to construct the viaduct there rendered necessary by

the presence of its tracks. The decision was acquiesced in so far as that point was concerned.

The distinctive feature in State *ex rel. vs.* C. St. P. M. & O. Ry. Co., 80 Minn., 416 (the Edgerton Avenue case) was not priority of the railway company over the street, but the fact that when the contract in question was made and the viaduct built there was no street over the original right-of-way at all. The railway company was of course not bound to build a viaduct there.

194 The viaduct here in question being necessary to serve the public safety it was, in my opinion, the duty of the Railway Company to construct it, and that irrespective of the question of priority hereinbefore discussed.

3. The duty having rested upon the Railway Company to construct the viaduct, was the agreement of September 22, 1891, between the Company and the City a valid one and is the Railway Company now relieved from making the needed repairs?

This question is fully answered by the case of State *ex rel. vs.* Minnesota Transfer Ry. Co., 80 Minn., 108. A city cannot, under the guise of making a contract, be permitted to barter away its governmental powers. The Railway Company was bound to take notice of that rule. Some of the rights bargained away in the case last mentioned were likewise bargained away here. The contract was therefore *ultra vires* and void. The fact that it may have been a compromise agreement is of no avail. 80 Minn., 117-118. Acts which are *ultra vires* are not less so when found in a compromise agreement. The City is not estopped from questioning the validity of the agreement. The public in such cases will be estopped or not as justice and right may require; but here, as in 80 Minn.,

195 118, the ends of justice will be subserved by compelling defendant to perform its duty.

In the Edgerton Avenue case the agreement was upheld because by means thereof the city procured not only a bridge but a street. The railway company having yielded a street where there was none before and having contributed to the building of a bridge where none could be required it was deemed inequitable, after rights in the way so opened had been acquired by user, to permit the city to set aside the agreement.

4. What limitations, if any, are there in cases of this kind to the repairs which may be required?

In such cases the substantial body and structure of the viaduct, including approaches, must be furnished and provided by the railway company whose operations make it necessary. The street must, so far as practicable, be restored to its former condition of usefulness; that is, it must be made reasonably safe and convenient for travel thereon. When it became necessary to build the viaduct here in question the grade of the avenue was raised from one end of the viaduct to the other, the rise being gradual at each end where the approaches are. These approaches were made of earth supported by lateral walls of stone with a cross-wall at the ends where

196 the viaduct proper begins. In this way the original structure and firmness of the avenue itself were continued and ex-

tended unimpaired to the higher grade. It was the same street, of the same character, at the higher grade. So far as appears, the adjacent property sustains to the avenue the same relations as before. Upon this statement my opinion is that as to the part of the avenue which has been so raised the Railway Company cannot be required to bear the expense of re-paving. The exercise of the police power over the Railway Company is not designated to be carried so far as to relieve either the city or adjacent property from the burdens which in the ordinary course must be borne by the city or by such property.

Under possible extraordinary conditions not existing here the rule might be otherwise; but it seems different to justify compelling the Railway Company to pay for paving say the lower or first fifty feet at the extreme ends of the approaches, where the rise is slight, any more than compelling it to pay for the fifty feet next adjacent on the level and still farther away; and if this be true, the same rule applies to the entire length of the approaches, at least so long as the adjacent property has a valuable beneficial use of the avenue in question. While the Railway Company must maintain walls of stone and the earth embankment between, must maintain
197 former conditions at the higher grade, the cost of paving or re-paving should rest where it would if the grade had remained unchanged. The theory is that the Railway Company shall be compelled to bear whatever extra expense is occasioned by its presence and the operation of its lines. Paving a street which would have to be paved in any event is not such an extra expense; it is not such maintenance as is required of the Railway Company.

With respect to the elevated structure, or viaduct proper, the authorities agree that in a proper case the entire cost of erection and of every character of maintenance must be borne by the railway company. In this connection it may be said that every portion thereof is rendered necessary by the presence and operation of the railway lines. It becomes the duty of the Railway Company to connect the two approaches by an overhead bridge which will furnish a reasonably safe and convenient means of passage. This is nothing more or less than the completed structure. Nothing more is required; nothing less will do. It could have no counterpart if the avenue were on the original grade. In reference to repairs thereof no question can arise analogous to that concerning the question of paving the approaches. What is required of the viaduct proper is sustaining power and a reasonably even surface for travel. A pave-
198 ment thereon could not contribute substantially to either of these qualities, since what would be required to support the pavement would already be sufficient for the public use; and if a pavement should in such case be used it would be to subserve the interests of the Railway Company, by prolonging the life of the structure, subjecting the pavement to the wear and protecting the planking underneath. The viaduct proper is all an extra and every part of its original cost and subsequent maintenance should, and under the authorities, must be borne by the Railway Company.

What has been said in reference to the re-paving of the approaches

applies with equal force to resetting the curb thereon and to the repair and reconstruction of the sidewalks on either side thereof.

My conclusion therefore is that a writ of mandamus should issue requiring the Railroad Company to make repairs specified in the writ, excepting therefrom such as apply to the approaches, including the resetting of the curb thereon and the repairing and re-laying of sidewalks on either side thereof.

Filed in my office at — o'clock — m. Feb. 2, 1906.

J. P. JOHNSON,
*Clerk District Court,*
By V. A. DASH, *Deputy.*

199

In District Court, Eleventh Judicial District.

STATE OF MINNESOTA, *County of St. Louis:*

STATE OF MINNESOTA *ex Rel.* CITY OF DULUTH, Relator,
*vs.*
NORTHERN PACIFIC RAILWAY COMPANY, Respondent.

This matter being regularly upon the calendar of the March 3, 1906 special term of the above named court, came on for hearing before the undersigned on the application of the Respondent for an order making additional findings of fact and amending the findings of fact heretofore filed herein.

Messrs. J. L. Washburn and W. D. Bailey appeared as attorneys for the Respondent and Bert Fesler, Esq., appeared as attorney for the Relator and the matter was submitted to the court and the court now makes the following additional findings of fact:

200 1. There shall be added to the third paragraph of the Findings of Fact heretofore filed and immediately following the quotation from the deed therein set forth, the following:

"But the said Lake Superior & Mississippi Railroad Company which was at the time of the making of said plat and for some time prior thereto had been in possession of said strip of land above mentioned, as more particularly hereinafter found, did not execute said plat; that the said strip conveyed by the above mentioned deed was crossed by avenues other than Lake Avenue, to which said avenues the last above quoted clause of said deed was applicable."

2. Add to the findings of fact heretofore filed the paragraph numbered 7½ to be inserted immediately before paragraph 8 of the said findings as follows:

"That some time prior to the entering into said agreement between the St. Paul & Duluth Railroad Company and the City of Duluth plans and specifications for the building of a viaduct were prepared by the city engineer of the city of Duluth, approved by the council and demand made upon the St. Paul & Duluth Railroad for the building of a viaduct in accordance with such plans and specifications? That considerable negotiation ensued. The Railroad

201 Company refused to build the viaduct, disputed its obligation so to do, but later on said contract Exhibit "A" attached

to the Respondent's answer herein, was entered into between the said parties."

3. The application for the amendment of paragraph seven of the Findings heretofore filed is denied, but it is ordered that that part of said findings at about the middle of paragraph seven, reading as follows in the original findings:

"By agreement then made between the city and the Railroad Company, the latter bound itself to contribute $50,000.00 toward the cost of the viaduct and the approaches, and the city undertook to construct the same."

be amended so as to read as follows:

"By the agreement, which was Exhibit "A" attached to the Respondent's answer, then made between the city and the Railroad Company, the latter bound itself to contribute $50,000. toward the cost of the viaduct and approaches and the city undertook to construct the same" etc.

At the same time and place there came on for hearing the application for amended findings and the making of additional findings on the part of the Relator and the same attorneys appeared upon said application, and the court being fully advised makes the following findings in addition to those heretofore filed:

202 "7*a*. Said viaduct, including approaches, extends from Superior street at the northerly end thereof to Sutphin street at the southerly end. The Superior street or northerly approach extends from the south line of Superior street to a distance of 53.98 feet as a fill surrounded by four stone walls, the inside lines of the lateral walls of which approach are ten feet *feet* distant toward the center of the avenue from the respective lot lines. From the said southerly line of such filled approch (53.98 feet from the southerly line of Superior street) said viaduct continues an open bridge work 228.88 feet to the northerly line of the railroad; thence, 217.60 feet across said right of way; thence 246.45 feet as open bridge work to the northerly end of the southerly stone wall and filled approach to said viaduct; thence 284.21 feet to Sutphin street on the Southerly end of said viaduct and approaches. Said southerly filled approach of 284.21 feet consists of four stone walls and fill, the inside lines of the lateral walls of which are ten feet distant toward the center of the avenue from the respective lot lines. The width of Lake Avenue is 60 feet and the lateral walls of said northerly and southerly approaches do not extend to the lot lines of said avenue on either side."

203 The additional finding applied for by the Relator, and numbered 7-*b* in said motion is denied.

WM. A. CANT, *Judge*.

In District Court, Eleventh Judicial District.

STATE OF MINNESOTA, *County of St. Louis:*

STATE OF MINNESOTA *ex Rel.* CITY OF DULUTH, Relator,
*vs.*
NORTHERN PACIFIC RAILWAY COMPANY, a Corporation, Respondent.

The above entitled action came regularly on for hearing before the Court, without a jury, Bert Fesler appearing for said relator, and C. W. Bunn, Emerson Hadley, J. L. Washburn and W. D. Bailey appearing for said respondent, and the Court having duly considered the evidence and the argument of counsel and having made its findings of fact and conclusions of law and order for judgment,

Now, in pursuance to said order for judgment and in accordance with said conclusions of law,

It is hereby adjudged: that a peremptory writ of mandamus issue forthwith in this action commanding and directing the respondent, the Northern Pacific Railway Company, to make the repairs described in and in accordance with the plans and specifications therefor which are set forth in the paper marked Exhibit B, attached to the alternative writ herein, except repairing and relaying the sidewalk on the viaduct approaches, the resetting of curbing on the viaduct approaches, and the paving of the roadway of the approaches, and further commanding and directing the said respondent to proceed with such repairs with all reasonable dispatch and diligence and to complete the same by June 1, 1906; and that the relator recover of said respondent its costs heretofore taxed and allowed herein, amounting to the sum of $24.78.

204

Witness the Honorable William A. Cant, Judge of said Court, this 23d day of March, A. D. 1906.

J. P. JOHNSON, *Clerk,*
By V. A. DASH, *Deputy.*

[Seal of District Court.]

205 In District Court, Eleventh Judicial District.

STATE OF MINNESOTA, *County of St. Louis:*

STATE OF MINNESOTA *ex Rel.* CITY OF DULUTH, Relator,
*vs.*
NORTHERN PACIFIC RAILWAY COMPANY, a Corporation, Respondent.

To Bert Fesler, Esq., Attorney for the above named Relator, and to J. P. Johnson, Clerk of said District Court:

Please take notice: That the above named respondent, Northern Pacific Railway Company, appeals to the Supreme Court of the State

of Minnesota from the judgment of the District Court entered herein on the 23d day of March, A. D. 1906, and from the whole thereof.

Dated this 23rd day of March, A. D. 1906.

C. W. BUNN,
EMERSON HADLEY,
J. L. WASHBURN,
W. D. BAILEY,
*Attorneys for Respondent.*

500 Lonsdale Bldg., Duluth, Minn.

206 (Service admitted March 24, 1906.)

District Court, Eleventh Judicial District.

STATE OF MINNESOTA, *County of St. Louis:*

STATE OF MINNESOTA *ex Rel.* CITY OF DULUTH, Relator,
*vs.*
NORTHERN PACIFIC RAILWAY COMPANY, a Corporation, Respondent.

Whereas, the respondent, the Northern Pacific Railway Company, has appealed to the Supreme Court of the State of Minnesota from the Judgment entered in the District Court of St. Louis County, Eleventh Judicial District, State of Minnesota, on the 23rd day of March, 1906, in the above entitled proceeding,

Now, therefore, we, the Northern Pacific Railway Company, as principal, and the National Surety Company, as surety, are held and firmly bound to the City of Duluth, relator in the above entitled proceeding, in the sum of two hundred and fifty dollars
207 ($250.00) for the payment of which we hereby bind ourselves and our successors, jointly and severally, firmly by these presents.

Sealed with our seals this 23rd day of March, 1906.

The condition of the above obligation is such that if the appellant shall pay all costs and charges that may be awarded against it on said appeal, then this obligation shall be void; otherwise to remain in full force and effect.

NORTHERN PACIFIC RAILWAY COMPANY,
By C. W. BUNN, *General Counsel.*

Attest: R. H. RELF,
*Assistant Secretary.*
[CORPORATE SEAL.]

NATIONAL SURETY COMPANY,
By W. S. McCURDY,
*Its Attorney in Fact.*

In presence of
H. L. DONHOAR.
W. T. FRANCIS.
W. E. LUND.
H. E. BENEAU.

[CORPORATE SEAL.]

208 STATE OF MINNESOTA, *County of Ramsey, ss:*

Be it known, that on this 23rd day of March, 1906, personally appeared before me C. W. Bunn, who, being duly sworn, says that he is the General Counsel of the Northern Pacific Railway Company; that the seal affixed to the foregoing instrument is the corporate seal of said corporation; that said instrument was executed on behalf of the said corporation by authority of its board of directors and said C. W. Bunn acknowledged the said instrument to be the free act and deed of said corporation.

EDWIN IRLE,
*Notary Public, Ramsey County, Minnesota.*

My Commission expires October 9, 1906.

[NOTARIAL SEAL.]

STATE OF MINNESOTA, *County of Ramsey, ss:*

Be it known, that on this 23rd day of March, 1906, personally appeared before me W. S. McCurdy who, being duly sworn, says that he is the attorney in fact of the National Surety Company; that the seal affixed to the foregoing instrument is the corporate seal of said corporation; that said instrument was executed on be-
209 half of the said corporation by authority of its board of directors and said W. S. McCurdy acknowledged the said instrument to be the free act and deed of said corporation.

W. E. LUND,
*Notary Public, Ramsey County, Minnesota.*

My Commission expires May 1, 1912.

[NOTARIAL SEAL.]

I hereby approve the within bond and the surety thereon as an appeal bond.

March 24, 1906.

(Signed) W. A. CANT, *Judge.*

Service admitted March 24, 1906.

210 14836.

STATE OF MINNESOTA:

Supreme Court, April Term, A. D. 1906.

No. 197.

STATE *ex Rel.* CITY OF DULUTH, Respondent,
*v.*
NORTHERN PACIFIC RAILWAY COMPANY, Appellant.

*Syllabus.*

State *ex rel* City of Minneapolis *v.* St. P. M. & M. Ry. Co., *et al.*, filed herewith, and State *ex rel. v.* Ry. Co., 80 Minn. 108, to the effect, (1) that the obligation to construct and maintain in suitable repair for public use safe crossings at streets and highways laid out over a railroad right of way after the construction of the road rests on the railroad company, and, (2) that contracts with municipalities, by which the company is relieved from that obligation and the municipality deprived of the right of enforcing it as a police regulation, are *ultra vires* and void, followed and applied.

Judgment affirmed.

211 14836.

STATE OF MINNESOTA:

Supreme Court, April Term, A. D. 1906.

No. 197.

STATE *ex Rel.* CITY OF DULUTH, Respondent,
*v.*
NORTHERN PACIFIC RAILWAY COMPANY, Appellant.

*Opinion.*

Proceedings instituted by the city of Duluth to compel appellant, the Northern Pacific Railway Company, to repair and thereafter maintain in suitable condition for public use a viaduct now existing over its tracks at Lake Avenue in that city. Judgment was ordered and entered against the company, awarding the relief demanded, from which it appealed.

1. The material facts, so far as the obligation of appellant to keep and maintain the viaduct in repair is concerned, are substantially

like those presented in the case of State *ex rel.* Minneapolis *v.* St. Paul, Minneapolis & Manitoba Railway Company *et al.,* filed herewith. The Lake Superior & Mississippi Railroad Company, a corporation, laid its tracks upon the land over which the viaduct in question now extends in 1869. Thereafter Lake Avenue was laid out and established over and across its right of way, and at all times since has been used continuously as one of the principal
212 thoroughfares of the city of Duluth. In 1892, travel upon the same had so increased that it became necessary in order to render the street safe for public use to construct a viaduct thereon over the tracks and right of way of the railroad company. Prior to that date the St. Paul & Duluth Railway Company had succeeded to all the rights and liabilities of the Lake Superior & Mississippi Company, and was operating its cars and trains over the tracks so crossing that street. The city demanded of the company that it construct and maintain a viaduct or bridge over its tracks at this point, but it refused to comply with the demand, insisting that it was not legally bound to do so. Subsequent negotiations resulted in a contract between the city and the company by which the former undertook to, and did, construct the viaduct, in conformity with plans and specifications agreed upon between the parties; and by which contract the company agreed to, and did, pay toward the expense of the same the sum of $50,000., the balance, $23,000., being paid by the city. It was further provided that the city should, after the construction of the viaduct, forever maintain and keep in repair the approaches thereto, and for the period of fifteen years keep in repair that portion which extends over the railroad right of way. The latter portion of the structure being out of repair at the time of and before the commencement of this proceeding, the city
213 repudiated the contract and demanded of appellant, successor of the St. Paul & Duluth Company, that it make the same at its own cost and expense. This proceeding was brought to enforce compliance with that demand. The principal question involved is whether appellant is under legal duty and obligation to keep the viaduct in repair. It is insisted that because of the fact that the street in question was established subsequent to the construction of the railroad, the railway company is under no statutory or common law duty to make the crossing safe, and that it cannot be required to do so without compensation. The case in this respect is substantially similar to the Minneapolis case above referred to, and we apply the decision there made, and hold, for reasons stated in that opinion, that the obligation to maintain the viaduct in repair rests upon the railway company.

2. It is further contended that the contract under which the viaduct was constructed, and by which the city agreed forever to keep in repair the approaches and that portion thereof over the tracks for the period of fifteen years, is a valid binding contract and relieves appellant, even conceding that the obligation otherwise rests upon it. We are unable to distinguish the case from State *ex rel v.* Ry. Co., 80 Minn. 108, and Ry. Co. *v.* Nebraska, 170 U. S. 57. By the

terms of the contract, the city attempted forever to divest itself of the right to enforce appropriate police regulations in respect
214 to the care and maintenance of the viaduct, and the case comes clearly within the general rule that contracts of that character are *ultra vires* and void. The obligation to construct and maintain the approaches to this viaduct rested upon the railway company, and it could have been required to build the same, as well as that portion extending over its right of way. State *v.* Ry. Co., 35 Minn. 131. And the city, if the contract be valid, has deprived the public of the right to enforce that obligation against the company. We were impressed on the oral argument that the viaduct in question, about 1000 feet in length, could not have been wholly imposed upon the company, and that it therefore might fairly be said that the contract involved matters within the authority of the city and could be sustained. But the findings of the court below dispose of the question adversely to the company. The court expressly found that the "viaduct was built at the lowest practicable height over the tracks of the railroad company, and that the approaches thereto are as steep, and the viaduct as a whole as short, as it was safe to make them." These findings are not challenged, and are not overcome by the amendment added thereto by the trial court subsequent to filing the original decision, by which the dimensions of the different parts of the structure are given. And as suggested, within the decision in the Minneapolis case, which we here apply, the company could have been required to build the entire structure, approaches
215 and all, and it was beyond the power of the city to assume the burden, or forever to relieve the company from its obligations in this respect. Of course, contracts with municipalities ought to be enforced as contracts between individuals are enforced, but the authorities are uniform that a municipal corporation cannot contract away the right of the public to enforce proper police regulations. All attempts to do so have been held void by the courts. It is true that a controversy existed between the parties in the case at bar respecting the rights and obligations of each, but the company parted with nothing it could not have been required to part with; and there was no consideration for the engagement of the city to keep and maintain the viaduct in repair. Within the authorities, the contract cannot be sustained. City of Newton *v.* Ry. Co., 60 Ia. 422; Shortle *v.* Ry. Co., 131 Ind. 338; Ry. Co. *v.* Bristol, 151 U. S. 556; Ry. Co. *v.* Mayor, 38 S. E. (Ga.) 60; Elliott on Roads and Streets, 805; 20 Am. & Eng. Ency. Law, 1159.

Judgment affirmed.

BROWN, *J.*

216 [Endorsed:] No. 14836 State of Minnesota, Supreme Court. State *ex rel.* City of Duluth *vs.* Northern Pacific Ry. Co., Copy Opinion and Syllabus Filed June 29 1906 C. A. Pidgeon Clerk. April Term, A. D. 1906 Brown J.

217 STATE OF MINNESOTA:

Supreme Court, April Term, A. D. 1906.

No. 197.

STATE OF MINNESOTA *ex Rel.* CITY OF DULUTH, Respondent,
*v.*
NORTHERN PACIFIC RAILWAY COMPANY, Appellant.

Pursuant to an order of Court duly made and entered in this cause, on the 26th day of July A. D. 1906.

It is here and hereby determined and adjudged that the Judgment of the Court below, herein appealed from, to wit, of the District Court of the Eleventh Judicial District, sitting within and for the County of St. Louis be and the same hereby is in all things affirmed.

Dated and signed this 26th day of July A. D. 1906.

By the court.

Attest:

C. A. PIDGEON, *Clerk.*

Statement for Judgment.

218 [Endorsed:] State of Minnesota, Supreme Court. State *ex rel.* City of Duluth, Respondent *v.* Northern Pacific Ry. Co., Appellant. Transcript of Judgment. Filed July 26th A. D. 1906 C. A. Pidgeon, Clerk. Attorney for —— —— Page No. — Book.

STATE OF MINNESOTA, *Supreme Court, ss:*

I, C. A. Pidgeon, Clerk of said Supreme Court, do hereby certify that the foregoing is a full and true copy of the Entry of Judgment in the cause therein entitled, as appears from the original remaining of record in my office; that I have carefully compared the within copy with said original, and that the same is a correct transcript therefrom.

Witness my hand and the seal of said Supreme Court at the Capitol, in the city of St. Paul, this 8th day of August A. D. 1906.

C. A. PIDGEON, *Clerk.*

219 STATE OF MINNESOTA:

Supreme Court, April Term, A. D. 1906.

No. 197.

STATE OF MINNESOTA *ex Rel.* CITY OF DULUTH, Respondent,
*v.*
NORTHERN PACIFIC RAILWAY COMPANY, Appellant.

Appeal from District Court Eleventh Judicial District, County of St. Louis.

This cause having been duly argued and submitted at the General April Term of this Court, A. D. 1906, upon the return to the appeal herein.

Now after full and mature deliberation had thereon, it is here and hereby ordered that the Judgment of the Court below, herein appealed from, be and the same hereby is, in all things affirmed, and that the Respondent above named have judgment accordingly.

Entered July 26th, A. D. 1906.

By the Court.

Attest:

C. A. PIDGEON, *Clerk.*

I hereby certify that the foregoing is a full and true copy of the original Order for judgment entered in the above entitled cause.

Attest:

C. A. PIDGEON, *Clerk.*

220 [Endorsed:] No. 14836 State of Minnesota, Supreme Court. Copy of Order for Judgment. Filed July 26th A. D. 1906 C. A. Pidgeon Clerk. Entered on Page 332 P.

221 STATE OF MINNESOTA:

Supreme Court, General April Term, A. D. 1906.

Monday morning, 9:30 o'clock, May 28th, A. D. 1906.

Court convened pursuant to adjournment. All the Justices being present.

Cal. No. 197. Reg. No. 14836.

STATE OF MINNESOTA *ex Rel.* CITY OF DULUTH, Respondent,
*vs.*
NORTHERN PACIFIC RAILWAY COMPANY, Appellant.

This cause came on to be heard this day upon the return to the appeal herein.

Thereupon the same was argued by counsel, submitted to the court for decision and taken under advisement.

A true record.

Attest:

C. A. PIDGEON, *Clerk.*

The foregoing is a full and true copy of the Minutes of Argument in the above entitled cause.

Attest:

C. A. PIDGEON, *Clerk.*

222 [Endorsed:] 14836 State of Minnesota Supreme Court Copy of Minutes of Argument Filed July 26th A. D. 1906 C. A. Pidgeon, Clerk.

223 [Endorsed:] No. 14836 State of Minnesota Supreme Court. State *ex rel.* City of Duluth against Northern Pacific Ry. Co., Judgment Roll. Filed July 26 1906 C. A. Pidgeon Clerk.

224 STATE OF MINNESOTA:

Supreme Court, April Term, 1906.

STATE OF MINNESOTA *ex Rel.* CITY OF DULUTH, Appellee,
*vs.*
NORTHERN PACIFIC RAILWAY COMPANY, Appellant.

Now comes the Northern Pacific Railway Company, plaintiff in error, and prays that a writ of error in the above entitled cause may issue to the supreme court of the state of Minnesota, to review a certain judgment entered in said court on the 26th day of July, 1906, in favor of the state of Minnesota on the relation of the city of Duluth, against the Northern Pacific Railway Company, and the plaintiff in error assigns the following error in the rendition of said judgment:

The court erred in sustaining as valid the ordinance of the city of Duluth directing the plaintiff in error to make the bridge repairs in question in the suit, as against the objection, duly presented and urged in this cause, that the said ordinance violated the obligation of the contract set forth in the pleadings between the said city and the plaintiff in error's vendor, St. Paul and Duluth Railroad Company, contrary to the provisions of the constitution of the United States.

NORTHERN PACIFIC RAILWAY COMPANY,
By CHARLES W. BUNN, *Its Attorney.*

225 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the Judges of the Supreme Court of the State of Minnesota, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the Supreme Court of the State

of Minnesota, being the highest court of law or equity of the said state in which a decision could be had, before you, or some of you, between the State of Minnesota upon the relation of the City of Duluth, Respondent, and the Northern Pacific Railway Company, Appellant, wherein was drawn in question the validity under the constitution of the United States of an act of the city council of Duluth, alleged to violate the obligation of a contract, and the decision was in favor of the validity of such legislation, a manifest error hath happened, to the great damage of the said Northern Pacific Railway Company, as is said; we, being willing that such error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Justices of the Supreme Court of the United States, at the Capitol in the City of Washington, together with this writ, so that you have the same at the said place, before the Justices aforesaid, within thirty days from the date hereof, that the record and proceedings aforesaid being inspected, the said Justices of the Supreme Court may cause further to be done therein, to correct that error, what of right and according to the law and custom of the United States ought to be done.

Witness, the Hon. Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this 27th day of July, A. D. 1906.

[U. S. Circuit Court Seal, Dist. of Minnesota, Third Division.]

HENRY D. LANG,
*Clerk of the Circuit Court of the United States for the District of Minnesota.*
By LOUISE B. TROTT, *Deputy.*

226 The above writ is allowed.

CHAS. M. START,
*Chief Justice of the Supreme Court of Minnesota.*

UNITED STATES OF AMERICA, *State of Minnesota, ss:*

In obedience to the command of this writ, I hereby transmit to the Supreme Court of the United States a duly certified transcript of the record and proceedings in the within entitled cause, with all things concerning the same.

Witness my hand and official seal the 27th day of July, 1906.

C. A. PIDGEON,
*Clerk of the Supreme Court of the State of Minnesota.*
By J. L. HELM,
*Deputy Clerk.*

227 [Endorsed:] State of Minnesota. Supreme Court. State *ex rel.* Duluth, *vs.* Northern Pacific Ry. Co., Defendant. Writ of Error. C. W. Bunn, attorneys for Defendant, St. Paul, Minnesota.

228 STATE OF MINNESOTA:

Supreme Court, April Term, 1906.

STATE OF MINNESOTA *ex Rel.* CITY OF DULUTH, Appellee,
*vs.*
NORTHERN PACIFIC RAILWAY COMPANY, Appellant.

United States of America to the State of Minnesota and the City of Duluth, Greeting:

You and each of you are hereby cited and admonished to be and appear at the supreme court of the United States, in the District of Columbia, within thirty days after the date hereof, pursuant to writ of error filed in the office of the clerk of the supreme court of the state of Minnesota, wherein the Northern Pacific Railway Company is plaintiff in error and the State of Minnesota on the relation of the City of Duluth is defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in said writ mentioned should not be corrected and speedy justice should not be done in that behalf.

Witness the Honorable Charles M. Start, Chief Justice of the supreme court of Minnesota, this 27th day of July, 1906.

CHAS. M. START,
*Chief Justice, Supreme Court of Minnesota.*

229 [Endorsed:] State of Minnesota Supreme Court. State *ex rel.* Duluth *vs.* Northern Pacific Co., Defendant. Citation. C. W. Bunn, Attorneys for Defendant, St. Paul, Minnesota.

Personal service of this instrument and receipt of copy thereof admitted at Duluth this 28th day of July, 1906.

BERT FESLER,
*City Att'y of Duluth and Attorney for Appellee.*

Due service of this instrument and receipt of copy thereof admitted at St. Paul this 30 day of July, 1906.

EDWARD T. YOUNG,
*Att'y General for State.*
—— SIMPSON, *Asst.*

230 STATE OF MINNESOTA:

Supreme Court, April Term, 1906.

STATE OF MINNESOTA *ex Rel.* CITY OF DULUTH, Appellee,
*vs.*
NORTHERN PACIFIC RAILWAY COMPANY, Appellant.

Know all men by these presents, that we, Northern Pacific Railway Company, as principal, and National Surety Company, a corporation organized and existing under the laws of the state of New York, as surety, are firmly bound unto the City of Duluth, in the

full and just sum of five hundred dollars, to be paid to said City of Duluth, its successors, representatives or assigns, to which payment well and truly to be made the said principal binds itself, its successors and assigns, and the said surety binds itself, its successors and assigns, jointly and severally, by these presents.

Sealed with our seals and dated this 26th day of July, in the year of our Lord one thousand nine hundred and six.

Whereas, lately, in the supreme court of the state of Minnesota, in a suit pending in said court between State of Minnesota *ex rel.* City of Duluth, Appellee, and Northern Pacific Railway Company, Appellant, judgment was rendered against said appellant, Northern Pacific Railway Company, and the said appellant having obtained a writ of error and filed a copy thereof in the office of the clerk of said court to reverse the judgment in the aforesaid cause,
231 and the citation directed to the State of Minnesota and the City of Duluth, citing and admonishing them to be and appear at the supreme court of the United States at Washington, in the District of Columbia, within thirty days after the date thereof:

Now, the condition of the above obligation is such that if the said Northern Pacific Railway Company shall prosecute said writ of error to effect and answer all damages and costs if it shall fail to make its plea good, then the above obligation to be void, otherwise to remain in full force and virtue.

NORTHERN PACIFIC RAILWAY COMPANY,
By CHARLES W. BUNN, [SEAL.]
*Agent and Attorney.*
NATIONAL SURETY COMPANY,
[SEAL.] By C. M. BEND.

In presence of
W. E. LUND.
L. A. GREEN.

Attest:
——— ———.

STATE OF MINNESOTA, *County of Ramsey, ss:*

On this 27th day of July, 1906, before me personally appeared C. M. Bend, Attorney in fact of the National Surety Company, the above named corporation, with whom I am personally acquainted, who, being by me duly sworn, said: that he is attorney in fact of said corporation, the National Surety Company, that he knows the corporate seal, that it was affixed by order of the board of directors of said corporation, and that he signed said instrument as attorney in fact of said corporation by like authority, and the said C. M. Bend acknowledged said instrument to be the free act and deed of said corporation.

[SEAL.] W. E. LUND,
*Notary Public, Ramsey County, Minnesota.*

My commission expires 5-1-1912.

232 *Assignment of Errors.*

The Court erred:

1. In holding that the city of Duluth had authority under its police power to require a railway company to carry over its track by a bridge a highway opened after the location of the railway.

2. In holding that the contract between the city and the railway company was without consideration or void.

3. In rendering judgment that the railway company repair the viaduct as demanded.

233 STATE OF MINNESOTA, *Office of Clerk of Supreme Court, ss:*

Supreme Court.

I, C. A. Pidgeon, Clerk of the Supreme Court of the State of Minnesota, do hereby, in obedience to the Writ of Error herein issued, certify and return to the Supreme Court of the United States, that the foregoing and annexed transcript of record is a full and complete transcript of the record, judgment, judgment roll and all of the proceedings had in the said Supreme Court of the State of Minnesota, in the case between the State of Minnesota *ex rel* City of Duluth, Respondent *v.* The Northern Pacific Railway Company, Appellant, including the opinion of the said Supreme Court therein, also a true and correct copy of the assignments of error filed by appellant in the State Supreme Court.

And I do further certify and return that I have annexed to said transcript and included therewith, and that the foregoing is the Original Petition for Writ of Error, with allowance of same, and also the Assignment of Errors, and Petition for Reversal, as the same remains on file and of record in said Supreme Court of the State of Minnesota, and also the Original Writ of Error from the Supreme Court of the United States and the citation issued thereon, with proof of service thereof thereon, and on each of the same endorsed, and that the foregoing constitutes a true, full and complete return to said Writ of Error.

In witness whereof I have hereunto set my hand and the seal of the said Supreme Court of the State of Minnesota, at the Capitol at St. Paul, Minnesota, this 13th day of August, A. D. 1906.

[Seal of the Supreme Court, State of Minnesota.]

C. A. PIDGEON,
*Clerk of the Supreme Court of Minnesota.*

Endorsed on cover. File No. 20,354. Minnesota supreme court. Term No. 92. Northern Pacific Railway Company, plaintiff in error, *vs.* The State of Minnesota upon the relation of The City of Duluth. Filed August 27, 1906. File No. 20,354.

Office Supreme Court, U. S.
FILED.
OCT 17 1907
JAMES H. McKENNEY,
CLERK.

# Supreme Court of the United States.

OCTOBER TERM, 1907.

No. 92.

NORTHERN PACIFIC RAILWAY COMPANY,
PLAINTIFF IN ERROR,

vs.

THE STATE OF MINNESOTA UPON THE RELATION OF THE CITY OF DULUTH.

BRIEF FOR PLAINTIFF IN ERROR.

CHARLES W. BUNN.

# Supreme Court of the United States.

OCTOBER TERM, 1907.

NORTHERN PACIFIC RAILWAY COMPANY, PLAINTIFF IN ERROR,

vs.

THE STATE OF MINNESOTA UPON THE RELATION OF THE CITY OF DULUTH.

BRIEF FOR PLAINTIFF IN ERROR.

*STATEMENT.*

This is a writ of error to review the final judgment of the Supreme Court of Minnesota, affirming the judgment of the District Court for St. Louis County in that state. The proceeding is mandamus brought by the city to compel the railway company to repair the bridge in Duluth carrying Lake Avenue over the railway company's tracks.

The question presented, upon which we rest the jurisdiction of this court, is violation by an ordinance of the city, which we assert to be a legislative act, of the obligation of a contract between

the city and the railway company's grantor casting upon the city itself the obligation to make the repairs in question.

No controversy will be made in this court about the facts. We accept the findings made by the state court. (See Findings, Trans., pp. 79-83 and 89, 90; also, Opinion of District Court, pp. 84-89, and of Supreme Court, pp. 94-96.)

The plaintiff in error derived title from the St. Paul & Duluth Railroad Company, which in turn bought from the Lake Superior & Mississippi Railroad Company. (Trans., pp. 80, 81, 82.)

The contract said to be violated is printed at pp. 17-20 of the transcript. It was made September 2, 1891, between the City of Duluth and the St. Paul & Duluth Railroad Company. Its provisions here material are, that the city should build, and that the railroad company should pay for to the extent of $50,000, a bridge upon Lake Avenue to carry that street over the railway tracks (which before crossed at grade) and that the city should for fifteen years maintain that part of the bridge over the railway right of way and should maintain perpetually the other parts of the structure. (Trans., p. 18.) The terms of the contract are clear and not in dispute, and they were, until the present action was brought, carried out by both parties. The city built the bridge, expending upon it over $23,000 besides the $50,000 contributed by the railway company. (Trans., p. 82.)

Within fifteen years after the bridge was built it became out of repair. The city, by ordinance or

resolution, passed July 13, 1903, (a) decided what repairs were necessary and approved the city engineer's plans and specifications for the same, and (b) disaffirming the contract resolved that the railway company should make these repairs. (Trans., p. 24.)

To this proceeding, which was brought to enforce this ordinance, the railway company among other defenses specially set up in its answer immunity under the contract from making the repairs, and that the ordinance of the city violated the obligation of the contract, contrary to the guaranty of the Constitution of the United States. (Trans., p. 16.)

One of the important controversies raised by the pleadings was whether Lake Avenue at the point in question existed as a street before the railway was located and built. The relation alleged priority of the street over the railway. (Trans., pp. 2, 3.) The answer as distinctly asserted priority of the railway over the street. (Trans., p. 14.) This issue was settled in favor of the railway company's contention, and the case was decided in both state courts upon that finding. (Finding, Trans., p. 81; Opinion of Trial Court, p. 85; Opinion of Supreme Court, p. 95.)

The bridge was built under the circumstances following: Demand to build it was in 1891 made by the city upon the St. Paul & Duluth Railroad Company. That company disputed its obligation to build, and refused the demand. (Trans., p. 89.) Negotiations ensued and the matter in dispute was

compromised by the parties entering into the contract of Sept. 2, 1891, the city agreeing to build and to repair for fifteen years, and the railway company to pay the major part of the cost of construction. (Trans., p. 89.)

The Minnesota Court in this case (and in another heard with it, 98 Minn. 380 and 429) for the first time laid down the rule, that a railway is bound to bridge streets laid out *after* its construction as well as those before existing (a proposition contrary, as we shall attempt to show, to the rule of law previously established and applied in that state). The court holding this always to have been the law of the state, and, as we shall submit, overruling in this respect its prior decisions, said that consequently the contract in question was without consideration, and was therefore no contract.

We say:

(a) That the law of Minnesota prior to the decision in this case imposed upon railways the obligation forever to provide for the public travel over highways upon which they enter and thus impair the usefulness of; but that as to new ways the settled rule was that no such obligation existed; which if true would make the contract *clearly* valid; or,

(b) That even if the rule in this respect was doubtful and unsettled it was a fair subject of compromise; and that this contract, entered into to compromise that question, as well as the question who *was* prior upon the *locus in quo*, is a valid contract, and cannot be brushed aside by saying

that it compromised nothing because the whole burden is *now* decided then to have rested upon the railway company.

Proper errors to raise these questions are assigned in the record. (Trans., p. 202.)

## *ARGUMENT.*

*As to the jurisdiction:*

(a) The Supreme Court of Minnesota held there was no contract, and therefore did not come to the question whether a law of the state violated a contract. But this court has jurisdiction of the question, and will decide for itself, whether there was a contract. *Stearns v. Minnesota*, 179 U. S. 223, 232-3 and cases cited. When the merits of the case are reached we shall therefore submit, that the contract of 1891 between the city and the railway company was a perfectly valid and binding agreement.

(b) If the contract was valid, was it violated by a *law* of the state? Confessedly to show it was violated only by an erroneous decision of the state court does not give this court jurisdiction. The state law which we say violated the contract is the city ordinance or resolution of July 13, 1903. (Trans., p. 24.)

This ordinance was a legislative act in two respects: (a) a legislative determination, which could be made in no other way, of *what* repairs should be made; (b) a legislative determination

that the railway company and not the city should make them.

The action of the city was not confined to a denial of the validity, or of the binding force in some particular of the contract, as in *St. Paul Gas Light Co. v. St. Paul*, 181 U. S. 142. In that case the city disputed the interpretation of the contract insisted on by the gas company, and the city ordinance, to the effect that that interpretation be denied and resisted, amounted to nothing more than a statement of the city's position upon the meaning of the agreement. But here the action brought could not stand for a moment without a legislative decision of two things, both resting in legislative discretion. First, what repairs should be ordered was a legislative question, without determination of which this action could not be brought. And, in the next place, the *locus* being a street, and so within the control of the city, it had power to itself repair the bridge; the railway company was in no way bound, without the ordinance, to make the repairs; indeed without the ordinance it would have been a trespasser in the street had it attempted to make them. (See Findings, Trans., p. 79, and Charter of Duluth, c. 2, Spl. Laws Minn. 1887.)

It is well settled that *city* laws are *state* laws within the meaning of the Federal Constitution (*Mercantile Trust Co. v. Columbus*, 203 U. S. 311, and cases cited p. 320), and the jurisdiction of this court is sustained by *Vicksburg Waterworks Company v. Vicksburg*, 185 U. S. 65, 81; New Orleans

*Waterworks Company v. Louisiana*, 185 U. S. 336, 350, and *City of Cleveland v. Cleveland City Ry. Co.*, 194 U. S. 517, 530-531; see *Dawson v. Columbia Trust Company*, 197 U. S. 178.

*As to the merits:*

I.

The fact of the railway's priority in Lake Avenue being settled by the findings, we inquire, what was by the law of Minnesota, in 1891 when the contract was signed and afterwards while it was being performed, the duty of the railway company as to public travel upon such subsequently opened street?

The first evidence of the law is the charter of the Lake Superior & Mississippi Railroad Company alluded to in the findings (Trans., p. 80; Sec. 6 of the Charter, Spl. Laws Minn. 1861, c. 1) provided:

> "The said company may construct the said railroad across any public or private road, highway, stream of water or water course, if the same be necessary; *provided*, that the same shall not interfere with navigation; but said company shall return the same to their primitive state, or in a sufficient manner so as not to impair the usefulness of such road, highway, stream of water or water course, to the owner or to the public."

There never has been any general statute of the state touching the question.

The first decision of the Minnesota courts was *State ex rel. City of Minneapolis v. St. Paul, Minne-*

*apolis & Manitoba Railway Company* 35 Minn. 131. This case was decided April 7, 1886, and involved the duty of the railway company, under a charter provision quite like that above quoted, to bridge or otherwise provide for public travel upon a street existing when a railway was built across it. The court said, p. 133:

> "The common law rule is that where a person or corporation is given the right to build a railroad or make a canal across a public highway, this gives them no right to destroy it as a thoroughfare, but they are bound to restore or unite the highway at their own expense, by some reasonably safe and convenient means of passage, although the statute contains no express provision to that effect. This duty includes the doing of whatever is necessary to be done to restore the highway to such condition; as, for instance, in case of a bridge, the approaches or lateral embankments, without which the bridge itself would be useless. This duty is founded upon the equitable principle that it was their act, done in pursuit of their own advantage, which rendered this work necessary, and therefore they, and not the public, should be burdened with its expense. *Qui sentit commodum sentire debet et onus. King v. Inhabitants of Lindsey*, 14 East, 317; *King v. Kerrison*, 3 Maule & S. 526; *Leopard v. Chesapeake & Ohio Canal Co.*, 1 Gill. 222; *Northern Central Ry. Co. v. Mayor of Baltimore*, 46 Md. 425; *Eyler v. Co. Comm'rs Allegany Co.*, 49 Md. 257; *In re Trenton Water-Power Co.*, 20 N. J. Law, 659; *People v. Chicago & Alton R. Co.*, 67 Ill. 118; *Queen v. Inhabitants of Isle of Ely*, 15 Q. B. 827; *Paducah, etc., R. Co. v. Commonwealth*, 80 Ky. 147."

The court held this to be a *continuing* duty and, quoting the language of the charter, said it was only declaratory of the common law; at page 140, as to the charter, the court added with care and deliberation (what was consequently as well said respecting the common law obligation):

> "It can hardly be necessary to add that the statute, and what we have said regarding its construction, has reference only to cases where the railroad has been constructed *in a street*, and not to cases where new streets have been laid out over or across the railroad subsequent to its construction."

The common law rule laid down in the authorities cited by the court was well stated in *Boston & Albany Railroad Co. v. Cambridge*, 159 Mass. 283, 287, as follows:

> "But at common law the crossing of a new way with one already in use must be made with the least possible injury to the old way, and whatever structures are necesssary must be erected and maintained at the expense of the party making the new way, and if the old way cannot be crossed without damage, the damage must be ascertained and paid. *Perley v. Chandler*, 6 Mass. 454; *Richardson v. Bigelow*, 15 Gray, 156; *Lowell v. Proprietors of Locks and Canals*, 104 Mass. 18, 22; *King v. Kent*, 13 East, 220; *King v. Lindsey*, 14 East, 317, 322; *King v. Kerrison*, 3 M. & S. 526, 532; *Morris Canal and Banking Co. v. State*, 4 Zabr. 62; *Northern Central Railway v. Mayor, etc., of Baltimore*, 46 Md. 425."

Whilst the decision in 35th Minnesota did not directly involve a street opened over the railway, the principle carefully stated as controlling, *qui*

*sentit commodum sentire debet et onus*, was applicable to *all* public ways, and had been so applied in the authorities the court cites. And by this principle a new street over a railway must pay for itself. Not to leave this in doubt the court, it being a new and widely important case, used the language quoted and said that the statute, *which simply announced the common law*, had no application to new streets.

This case was followed by *State ex rel. St. Paul, Minneapolis & Manitoba Railway Company v. District Court*, decided December 26, 1889, 42 Minn. 247. There the question was who should lay and maintain the planking upon a new highway opened over a railway. The court held that the city should pay, saying (p. 252):

> "The planking has little, if anything, to do with the operation or safety of railway trains. The railway having been properly and lawfully constructed, the planking becomes a proper, and perhaps reasonably necessary, incident of the construction of the highway across the existing railroad. Independent of statutory regulation of the subject, it would have been the appropriate duty of the public authorities opening such a highway to make this necessary provision for the convenience of travellers on the highway, thus overcoming an obstruction to travel which lawfully existed upon the relator's property, and which could not be removed. This might be deemed a part of the work of constructing the highway and making it fit for travel. But while the legislature, as may have been expedient in view of the peculiar uses to which the railway track is subjected, has required the railroad company, which necessarily has the gen-

> eral control of its own track, in all cases to provide and maintain the planking, that does not determine the question of compensation. If, as has been suggested, the planking is to be deemed a part of the new highway, the railroad company cannot be required to construct and maintain it over its own right of way without compensation. *Ill. Cent. R. Co. v. City of Bloomington*, 76 Ill. 447; *City of Erie v. Erie Canal Co.*, 59 Pa. St. 174. As respects this subject, we see no reason why the decisions above cited as supporting the relator's contention should not be followed. We therefore think that the railroad company was entitled to compensation for the expense of providing and of maintaining the planking. There can be no distinction in this respect between the original construction and the subsequent maintenance, and so the authorities above cited affirm. The law requires the railroad company to maintain the planking, and it must be assumed now, when damages are being assessed once for all, that this requirement of the law will remain unchanged."

There can be no distinction between planks to carry public travel across the railway at grade and a bridge to carry it over. It is not too much to say that the two cases cited, decided before the contract in question was entered into, were fairly conclusive, that if at Lake Avenue the St. Paul & Duluth Railroad was upon the ground before the street, the public, and not the railway, was subject to the whole expense of providing for the street travel.

But subsequent decisions leave no room for doubt. The City of Duluth as appears in the findings spent $23,000 upon this bridge, and it raised

the money by assessment of property specially benefitted. In *State v. Ensign*, 54 Minn. 372, land owners assessed objected and among other things argued, that the St. Paul & Duluth Railroad Company was bound by law to pay the whole expense, and that therefore the city's contribution was contrary to law. In other words, they argued that they could not be assessed because the *very contract here in question* was without consideration and illegal. But the city attorney answered in his brief, that the evidence in the record *did not show the street to have been laid out before the railway,* and that without such a showing the contract was valid. This argument won the case, the court saying, pp. 377-378:

> "Again, even if the charter provision did not exist, it would be incumbent upon the relator to show that the street in question was within some statute which cast upon the railway company the duty of constructing the structure contemplated by the city authorities. Our attention has not been called to any such statute by counsel. They seem to assume that the law construed in *State ex rel. v. St. Paul, M. & M. Ry. Co.*, 35 Minn. 131, applies, but that was a provision found in the charter of the railway company, relator in that action, and was simply held applicable to a street laid out and established prior to the construction of the railway."

This decision, made in 1893, is a clear and distinct ruling upon the very contract here involved, and must be held to settle, that in Minnesota neither the common law or any statute compels a railway to provide for public travel upon new streets

opened across its tracks. This case was moreover brought and decided before the time, specified in the contract for completion of the bridge and for the railway company's payments to the city, had expired; therefore while the work and payments were in progress. (See Trans., fols. 41-44.)

The same doctrine was re-affirmed in *State ex rel. City of St. Paul v. Chicago, St. Paul, Minneapolis & Omaha Ry Co.*, 85 Minn. 416, decided February 14, 1902. In that case the Omaha company owned a right of way one hundred feet in width antedating the existence of the street, and afterwards bought adjoining additional land subject to the street which had been platted in the meantime. The City of St. Paul in the case cited was endeavoring to compel the Omaha company to repair a bridge built under an agreement between the city and the railway company as follows: That the railway company would build the bridge proper according to the plans of the city, and the city would build the approaches and thereafter forever maintain and repair the whole structure at its own expense. The argument in that case was precisely the same as here, that the contract was invalid because the whole obligation was in law upon the railway company, but the court said, pp. 420-422:

> "It is immaterial whether the action taken by relator with reference to the construction and maintenance of the bridge was legal or not. We are only concerned with the obligations and responsibilities assumed by defendant at the time it entered into such an arrangement and constructed the bridge. The propo-

sition is simply this: It being conceded that the defendant company could not be compelled to build a bridge over its original one hundred feet, the mere fact that it did so at the request and inducement of the relator could in no way take from defendant those rights in the street which it originally held. To state it in another way: If the city was at that time unable to oblige the defendant to bridge over its original right of way, yet it was within the power of the common council to enter into a contract with defendant to secure the desired bridge; and if such contract was actually entered into, lawfully or unlawfully on relator's part, thereby inducing defendant to proceed and build the bridge, which it could not otherwise have been forced to do, then the relator will not be heard to say that it did not have the power to do that which it in fact accomplished. The question of the city's rights and powers here involved is entirely different from one that would arise in a case where the public had a priority of right in a street. The conclusion inevitably follows, therefore, that, so far as the original right of way is concerned, defendant waived nothing because of its action in constructing the bridge, and the city gained nothing even conceding that it did not legally enter into the contract. And if defendant's right of priority has not been waived by carrying the contract into effect, then the city has now no greater power to compel defendant either to build or maintain a bridge over its original right of way than it had before the agreement was entered into and carried out.

4. There is no specific finding that any part of defendant's tracks occupied the right of way beyond the one hundred feet first procured, and this proposition is not expressly raised in the petition; but it appears from the evidence and the plats that at the time the bridge was built, and since, defendant has continuously occupied a right of way beyond the

one hundred feet. Conceding that relator is entitled to raise the question, we will consider whether defendant is in any way obligated to repair or maintain that part of the bridge over its additional grounds and tracks, though the question has already been practically answered. As to the one hundred feet the city had no rights and could obtain the bridge only by reason of the contract. If relator needed a bridge at that point, its only legal course, if any it had, was to condemn and acquire a public highway over defendant's right of way, and then compel defendant to join it in the construction and consequent maintainment of a bridge."

This language is clear: the case holds that as to the original one hundred foot right of way acquired before the street was laid out the city could not have compelled the railway company to bridge, whilst as to the additional right of way it could; and that the contract of the city *perpetually* to maintain the whole bridge was upon these facts valid.

It would be difficult to state any question more clearly and thoroughly settled by any court's decision than the question under discussion passed on in the four decisions we have cited. In overruling these cases the Supreme Court of Minnesota, 98 Minn. 95, said that the first was *obiter* and ignored wholly the last three. The better reason and authority was said to favor laying the burden upon the railway, regardless of the question of priority. Perhaps the court is right. For the sake of argument, we may safely so concede. We shall not be led away from the point here material by

entering upon any consideration of what is or ought to be the rule of law. What is material here is, that in Minnesota the rule had been well settled the other way by earlier decisions, that no statute or other legislative change of the law intervened between them and the last, and that in this case the Supreme Court of Minnesota overruled its former decisions.

The foundation of the conclusion below was, that in 1891 when the contract was made the law of the state imposed upon the railway the *whole* burden of building and repairing the bridge. For that reason the contract dividing the burden was held bad. Except for the rule of law just stated, laid down by the Minnesota court for the first time in this case, that court would have held the contract good, for it does not differ in principle from the contract held good in the last case cited. (See statement of contract in that case, Opinion, 85 Minn., p. 418.)

But since *Ohio Life Insurance & Trust Company v. Debolt*, 16 How. 416, the doctrine has been often re-affirmed in this court, that upon the validity of an alleged contract this court follows the law of the state as it existed when the contract was consummated and will disregard later decisions to the contrary. In the case cited the chief justice, in delivering the opinion, p. 432, said:

> "The point arose in the case of Rowan and others v. Runnels, 5 How. 134. And the court then said, that it would always feel itself bound to respect the decisions of the state courts, and, from time to time as they were made, would

regard them as conclusive in all cases upon the construction of their own constitution and laws; but that it ought not to give them a retroactive effect, and allow them to render invalid contracts entered into with citizens of other states, which in the judgment of this court were lawful at the time they were made. It is true, the language of the court is confined to contracts with citizens of other states, because it was a case of that description which was then before it. But the principle applies with equal force to all contracts which come within its jurisdiction.

Indeed, the duty imposed upon this court to enforce contracts honestly and legally made, would be vain and nugatory if we were bound to follow those changes in judicial decisions which the lapse of time, and the change in judicial officers, will often produce. The writ of error to a state court would be no protection to a contract, if we were bound to follow the judgment which the state court had given, and which the writ of error brings up for revision here. And the sound and true rule is, that if the contract when made was valid by the laws of the state, as then expounded by all the departments of its government, and administered in its courts of justice, its validity and obligation cannot be impaired by any subsequent act of the legislature of the state, or decision of its courts, altering the construction of the law."

See also, *Taylor v. Ypsilanti*, 105 U. S. 60, 71; *Los Angeles v. Los Angeles City Water Co.*, 177 U. S. 558, 575; *Loeb v. Columbia Township Trustees*, 179 U. S. 472, 492; *Deposit Bank v. Frankfort*, 191 U. S. 499, 517-518.

II.

But, to say the least, the contract of 1891 was a fair compromise, was as such based upon valuable considerations moving to each party, and must be sustained upon that ground. It certainly cannot be affirmed, and the Supreme Court of Minnesota does not attempt in its last decision to say, that in 1891 the *clear and settled* legal obligation of the railway company was to build and forever repair the bridge.

When the parties made the agreement, and when it was performed by the erection of the structure, the law of Minnesota, to say the least, had not been held by its courts to charge railways with this obligation; and there was no statute. Conceding for the sake of argument that the law upon this point was then doubtful, the parties before the contract was made had before them several doubtful questions, each of which might become the subject of litigation:

(a) Which was in fact prior upon the *locus in quo*, the railway or the street?

(b) If the railway was first on the ground, did the law impose upon it *any* obligation?

(c) Was a bridge required by then existing public travel, and if so, what kind of a bridge, how wide, how high, how long, of what material, and how expensive? (These last are in Minnesota judicial questions which cannot be finally settled by city ordinance.)

The record now before the court shows, that whether the railway or the street was prior was a close question of fact, and an obligation of the railway to bridge if it was prior had not been (to say the least) so *clearly* established by any statute or by any decision, as to preclude the railway from reasonably denying such obligation. Considering the then rights of the parties as between each other, which were in so many respects doubtful, they were certainly fair matters of compromise; and to say, that a compromise honestly entered into and fully carried out is without consideration, because some fifteen years after the Supreme Court of Minnesota for the first time holds that the whole obligation could have been thrown upon the railway, is to violate the fundamental principle upon which compromise agreements are founded.

Lord Hardwicke said, in *Stapleton v. Stapleton*, 1 Atkyns, 12:

> "An agreement entered into upon a supposition of a right, or of a doubtful right, though it after comes out that the right was on the other side, shall be binding, and the right shall not prevail against the agreement of the parties, for the right must always be on one side or the other, and, therefore, the compromise of a doubtful right is a sufficient foundation of an agreement."

The doctrine of compromise is also admirably stated in *Chitty on Contracts*, 11 ed., vol. 1, p. 47 (note):

> "The real consideration which each party receives under a compromise, being not the sacrifice of the right, but the settlement of the dis-

pute and the abandonment of the claim, it is no objection to the validity of the transaction that the right was really in one of the parties only and that the other had no right whatever."

Mr. Justice Clifford, in delivering the opinion in *Hager v. Thompson*, 1 Black, 80, 93, said:

"Much the largest number of controversies between business men are ultimately settled by the parties themselves; and when there is no unfairness, and all the facts are equally known to both sides, an adjustment by them is final and conclusive. Oftentimes a party may be willing to yield something for the sake of a settlement; and if he does so with a full knowledge of the circumstances, he cannot affirm the settlement, and afterwards maintain a suit for that which he voluntarily surrendered."

The case of *United States v. Child*, 12 Wal. 232, involved this state of facts: During the Civil War the United States purchased of C. stores of the value of $478,000 and C. presented bills for that amount; a commission was appointed by the government to investigate the claims and ordered that $163,000 be deducted from the bills; C. afterward accepted the amount of the bill with deductions ordered by the commission and afterwards sued for the balance; the court of claims held that the bills as first presented were just and gave judgment for the amount deducted; the government appealed to the supreme court and the decision of the court of claims was reversed on the ground that the acceptance of the smaller amount was a compromise and settlement.

Mr. Justice Miller, delivering the opinion, said:

"If there had been no reference to, and no finding by, the commission, it would still remain true, that here was a claim, the justice of which had been denied and the amount that was due on it had been in dispute for nearly two years. The government finally says to the claimants: 'We will pay you a certain sum on this disputed claim provided you will take it in full satisfaction of the whole;' when, without intimidation, without fraud or concealment on the part of the government, without protest or objection on their part, the claimants accept the money offered and sign a receipt acknowledging it to be in full of the whole claim. Is not this a legal and binding compromise of the disputed demand? Is it not a voluntary adjustment of the matter in dispute between the parties? And we think that it is a strong additional argument in favor of the validity of this settlement, when it is called in question in court, that the sum so agreed upon was found to be a balance justly due on the claim by a commission of three capable and honest men, appointed by the government to ascertain what was due, and that before this commission the other party presented his claim and produced his witnesses, and was allowed a full and fair hearing to any extent that he desired.

"In this view of the case it is of no avail to urge that the court of claims has found that the whole claim was just and ought to be paid. After the compromise that question was no longer open to inquiry. It is of the very essence of such adjustments of disputed rights that the contest shall be closed; and whatever consideration might be given the finding of the court of claims on that subject in another department of the government, this department, which sits to administer the law, must be governed by its recognized principles."

The Minnesota Court through Justice Mitchell thus stated the law in *Demars v. Musser-Sauntry Land Co.*, 37 Minn. 418:

> "The defendant is entirely right in his law that the compromise of a disputed or doubtful claim is in itself a good consideration, and that no investigation into the character or value of the claims submitted will be gone into for the purpose of setting aside a compromise honestly made. It is sufficient if the parties entering into it thought at the time that there was a question between them. It is not even necessary that the question in dispute should be really doubtful, if the parties *bona fide* considered it so. The real consideration which each party receives under a compromise is not the sacrifice of the right, but the settlement of the dispute."

The decision of the Supreme Court of Minnesota rests, as we have before said, upon the proposition, that the contract was without consideration to the city, because the city might under the law have thrown the whole burden of the bridge upon the railway company. The court says, "if the contract be valid the city has deprived the public of the right to enforce that obligation against the railway company." This is all that is meant by the statement in the opinion, that by the contract the city attempted forever to devest itself of the right to enforce appropriate police regulations in

respect to the care and maintenance of the viaduct. The contract in no respect devested the city of its police power. Such a statement is a mere misuse of terms. The police power of the city consists in the right to regulate the use of the street and is in no way affected by the contract. The contract only deals with *who shall pay for repairs*, leaving the city all the power it ever had to say *when* they shall be made and in *what* they shall consist. The city has done nothing but assume the financial burden of repairs; and this is all that was intended, when it was said to have bargained away its police power. But it is not perceived that this constitutes a surrender in any respect of its *police* or *governmental* power, and the case is not touched by the principle appealed to.

The city, as held in *State v. Ensign, supra,* (Opinion, p. 377), without reference to its compulsory power over the railway company, had the right to make the bridge itself. It might have contracted for a bridge, either to be repaired by the contractor or to be repaired by the city. If the city agreed in such a construction contract to repair the bridge, would that agreement be an abdication of its police powers? Cities have the right to grant privileges for the laying of water mains, tramways and gas pipes in streets. The granting of such privileges involves either a permanent or long-continued partial occupation of a street; but has it ever been suggested that they are invalid as being abdications of a city's police power?

The court refers in its opinion to the finding, that the viaduct was built at the lowest practicable height above the tracks of the railroad company, and that the approaches were as steep and the viaduct as a whole as short as it was safe to make them. This finding is cited to negative the inference, that a valuable consideration might have been received by the city in respect of the size and character of the bridge; the size and character of the bridge having been, as before stated, questions which the Duluth company in 1891 might have taken to the courts for decision. There are several conclusive answers to this suggestion: (a) The finding does not say, that either the width or the character or expense of the structure is such, as could have been legally insisted upon by the city when the bridge was built. (b) The argument wholly violates the principle that a compromise cannot be set aside by showing the right to have been all upon one side. (c) It ignores the more essential matters compromised by the contract, namely, priority upon the ground and whether the railway company was liable to bridge if it was prior.

The court says it cannot distinguish this case from *State ex rel. City of St. Paul v. Minnesota Transfer Railway Co.*, 80 Minn. 108, and *Chicago, Burlington & Quincy Railroad Co. v. Nebraska, ex rel. Omaha*, 170 U. S. 57; but we submit that both cases are plainly and widely distinguishable. The case in 80 Minn. is distinguishable in two respects: (a) A part of the city's agreement in that case,

as construed by the court, was for all future time to abandon the old street and reduce its width one-half (see Opinion, pp. 115-117). The contract here contains no provision which ought to be, or which has been, so interpreted. No fair interpretation of the contract in question can draw from it the meaning that the city abandoned its right to require a different bridge or wholly different means of crossing the tracks, should future travel require either. (b) In that case the street was confessedly prior to the railway and the duty of the railway company to provide a bridge was admitted.

In *Chicago, Burlington & Quincy Railway Co. v. Nebraska*, the street was prior in time to the railway and the charter of the railway company, like that of the Lake Superior & Mississippi company, obliged it to restore streets where it crossed them (see Statement of Case, p. 60, and Opinion, p. 73); a contract was made for the construction only of a bridge which did not mention maintenance (Opinion, p. 73); the act authorizing the contract likewise mentioned original construction only (Opinion, p. 69); after the bridge was built the *legislature* passed an act imposing repair and maintenance upon railway companies (Opinion, p. 71). The opinion in the Nebraska case is authority only for a proposition which does not touch this case, viz.: That with respect to repairs, *as to which the contract was silent*, the legislature had power to impose them upon the railway company.

The authority of the city to make the contract

cannot be questioned for lack of charter power. The city by its charter was created a municipal corporation with power to sue and be sued, complain and defend in court, have a common seal, hold and purchase, lease and convey real estate and personal property, and was expressly given the power to contract and be contracted with, and the general powers possessed by municipal corporations at common law, and in addition the powers specifically granted (Spl. Laws Minn. 1887, c. 2, subc. 1, sec. 1). It had power to build the bridge (*State v. Ensign*, 54 Minn. 372) and had the usual and general control of the use of streets ordinarily possessed by cities. Its power to contract granted in section 1 of the charter means, to contract with relation to every subject within the scope of its corporate powers, that is, to contract, among other things, with respect to streets and with respect to bridges. It would be an unnecessary labor to cite the court to the numerous cases where contracts made by cities concerning the use and occupation of streets, contracts for the laying down of gas pipes, water pipes and sewers, contracts for the occupation of streets by tramways, have been sustained. And no branch of the power to contract is more fundamentally essential to every municipal corporation, as it is to every other corporation and to every individual, than the power to compromise. As the city has power to sue and to be sued, it must *ex necessitate* have the power to compromise. Such a power is essential to the transaction

of any business, either by a corporation or individual. It is constantly exercised by municipal corporations.

If the contract of the city, compromising matters which could have been made the subject of doubtful litigation, can be set aside years afterward, by the court holding that the right was wholly upon the side of the city, contracts with municipalities are thereby taken out of the category of other agreements and put upon the same basis with contracts of lunatics and infants.

CHARLES W. BUNN.

Office Supreme Court, U. S.
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# Supreme Court of the United States.

IN OCTOBER TERM, 1907.

NO. 92.

NORTHERN PACIFIC RAILWAY COMPANY,
Plaintiff in Error,

vs.

THE STATE OF MINNESOTA UPON THE RELATION OF THE CITY OF DULUTH.

## BRIEF OF DEFENDANT IN ERROR.

BERT FESLER.

# Supreme Court of the United States.

OCTOBER TERM, 1907.

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Plaintiff in Error,

vs.

THE STATE OF MINNESOTA UPON THE RELATION OF THE CITY OF DULUTH.

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## BRIEF OF DEFENDANT IN ERROR.

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### STATEMENT.

This is a writ of error to review a final judgment of the Supreme Court of Minnesota affirming a judgment in a mandamus proceeding brought by the City to compel the Railway Company to make certain repairs to what is generally known in the city of Duluth as the Lake Avenue viaduct.

The Lake Superior & Mississippi Railroad Company was a railroad corporation incorporated and chartered under Chapter 93 of the Special Laws of the Territory of Minnesota for the year

1857 and Chapter 1 of the Special Laws of the State of Minnesota for the year 1861. Its charter contained, among other provisions, the following:

> "Sec. 6. The said Company may construct the said railroad across any public or private road, highway, stream of water or water course if the same be necessary; *provided,* that the same shall not interfere with navigation; but said Company shall return the same to their present state, or in a sufficient manner so as not to impair the usefulness of such road, highway, stream of water, or water course, to the owner or to the public."
>
> "Sec. 17. This Act is hereby declared to be a public Act, and may be amended by any subsequent legislative assembly in any manner not destroying or impairing the vested rights of said corporation."

All the rights and obligations of the Lake Superior & Mississippi Railroad Company have inured to and become obligatory upon the Northern Pacific Railway Company.

The Lake Superior & Mississippi Railroad Company laid its first track across what is now Lake Avenue in 1869, which track has been continuously renewed and maintained ever since. Lake Avenue was actually graded and improved for public travel in the winter and spring of 1870-1871, and has ever since been in continuous use as a public travelled highway. (Trans. p. 81.)

The Lake Avenue viaduct was built in 1891-1892. At that time Chapter 2 of the Special Laws

of Minnesota for 1887 was in force. By that law, which was in legal effect an amendment of the charter of the Lake Superior & Mississippi Railroad Company, the legislature gave a charter to the City of Duluth which, by Sub-division 7 of Chapter 8, gave the common council of the city of Duluth power

> "to require railroad companies to construct at their own expense such bridges, tunnels or other conveniences at public railroad crossings as the common council may deem necessary."

A new charter was adopted by the City of Duluth which took effect in March, 1900. By paragraph 16, Section 64, the common council was vested with the power

> "to provide for, and change the location, grade and crossing of any railroad and to compel railroad companies to lower and bridge over their tracks or to construct viaducts over the same."

By the year 1891 the travel on Lake Avenue had so increased, the amount of business done by the Railroad Company on its tracks laid across said avenue was so great, and the passage of cars and engines and of trains of cars along said tracks was so frequent, that the safety of the public, the preservation of said avenue as a highway, and the maintenance of the same in such condition and state of repair as not to impair or interfere with its free and proper use, and not to

impair its usefulness as a highway, required the construction of a viaduct on Lake Avenue and over the tracks of the Railroad Company in order to carry said avenue over said tracks. (Trans. pp. 81, 82.)

At that time the City prepared plans and specifications for the construction of the viaduct and made a demand upon the Railway Company to build the same. Considerable negotiation ensued, the Railway Company refused to build the viaduct, disputed its obligation so to do, but later on executed the contract, Exhibit A, attached to the Company's answer in the mandamus proceedings, and the viaduct was then constructed as provided for therein. (Trans. pp. 83, 89.)

After the construction of the viaduct, all matters concerning the same between the City and the Railway Company remained in statu quo until the year 1903. By that time it was necessary to repair the viaduct; whereupon the common council passed a resolution directing the city engineer to submit to the council detailed plans and specifications for such repairs as were needed, and upon the coming in of the engineer's report the council adopted the resolution which is set out in full in the argument.

The demand provided for therein was made upon the Railway Company and compliance therewith was refused by it. (Trans. pp. 24, 25.)

When this case reached the Supreme Court of Minnesota, another case was pending therein that came up from Minneapolis involving many of the questions in this case, and both cases

were heard together, the principal opinion being filed in the Minneapolis case (*State ex rel. City of Minneapolis v. St. Paul, Minneapolis & Manitoba Railway Company,* 98 Minn., 380); and the decision in that case being cited and followed, without an extended opinion, in the Duluth case (*State ex rel. City of Duluth v. Northern Pacific Railway Company,* 98 Minn., 429). The decision in the Minneapolis case should therefore be read to acquaint one with the line of reasoning of the Court in arriving at its decision in the Duluth case.

We disagree with counsel for the plaintiff in error as to what was decided by the Supreme Court of Minnesota in this case, and what had theretofore been decided by the same court on cognate questions.

In our presentation of our case, we shall follow the order of the argument adopted by plaintiff in error, and attempt to show

(1) That this Court has no jurisdiction because the resolution of the common council is not a legislative enactment which impairs the obligation of the contract of 1891, even if such contract be considered valid.

(2) That if the resolution of the common council be held to be such a legislative enactment as would impair the obligation of the contract of 1891, if such contract be considered valid, that the contract itself is invalid for the reason that it is an attempt to contract away the exercise of the police power by the city.

(3) That, assuming the contract of 1891

cannot be upheld because the exercise of the police power by the city cannot be contracted away, neither can it be upheld as a compromise, because a municipality can no more compromise away the exercise of the police power than it can contract it away.

## ARGUMENT.

*As to the jurisdiction*:

The question which here first arises is answerable solely by a consideration of the resolution passed by the Common Council of the City of Duluth on July 13, 1903. This resolution reads as follows:

> "Resolved, that the repairs set forth in said specifications are necessary and proper, and are demanded by the public safety and convenience.
>
> Resolved further, that said repairs are reasonable and practicable for the repairs of said viaduct and its approaches; and that said repairs as set forth in said specifications are hereby adopted and approved.
>
> Resolved further, that this Council does hereby demand that the Northern Pacific Ry. Co. immediately proceed to repair said viaduct and approaches in accordance with said specifications.
>
> Resolved further, that a copy of this resolution be forthwith served upon the Northern Pacific Ry. Co. in the same manner as service may be made of summons in a civil action by the city clerk.

Resolved further, that in the event of the failure or refusal of said company to comply with such demand that the city attorney be and he is hereby instructed to institute such action or actions as to him may seem proper to compel the said Railway Co. to make such repairs, or such portion thereof as the court may determine it is legally liable to make." This resolution contains:

(1) A determination by the Council that certain repairs to the viaduct are necessary, proper, demanded by public safety and convenience, reasonable, practicable, and are therefore adopted. Nothing therein that would be improper or objectionable to the Northern Pacific Railway Company, if that were all there was to the resolution. Neither the contract nor the Railway Company are even mentioned.

(2) A demand by the Council that the Northern Pacific Railway Company make those repairs to the viaduct, a provision for a method of making that demand upon the Company, and an instruction to the City Attorney to institute such actions as he may deem proper to compel said Company to make such repairs or such portion thereof "as the court may determine it is *legally* liable to make."

If the making of the demand were all that was done under this portion of the resolution, no fault could be found by the Company. It could refuse the demand and that would end it. The making of the demand imposes no new duty or obligation on the Company, revokes no rights it

had, gives the City no new rights. Instructing the City Attorney to compel the Company to make such repairs to the viaduct as the Court may determine the Company is *legally* liable to make does not change the status quo. It in fact assumes that the legal rights and obligations are already fixed. The second part of the resolution simply means that a certain demand is made, a refusal to comply is anticipated, and a law suit is authorized to determine whether the demand or the refusal is legally enforcible.

> The Railway Company's answer says "that said ordinance or resolution was a legislative act which violates the obligation of the said contract, Exhibit A, attached hereto and that said ordinance or resolution is therefore void as being in violation of the Constitution of the United States." (Trans. p. 16.)

Counsel for plaintiff in error is ambiguous in stating, on page three of his Brief, that the resolution of July 13, 1903, "disaffirmed the contract" of 1891. Likewise, on the same page, where he says this mandamus proceeding "was brought to enforce this ordinance (resolution)." The resolution does not refer to the contract of 1891, and this proceeding was brought to enforce the law, whatever it was, prior to the passage of this resolution. As a matter of fact, the Supreme Court of Minnesota rests its decision on the law as it existed in 1857 when the Lake Superior and Mississippi Railroad Company secured its charter, unaffected by any *legislation* from that day to

the time of the commencement of this proceeding. Neither does the proceeding or the decision of the court attempt to nullify the contract as to anything that had theretofore been done under it or in pursuance of it. The $50,000 paid by the Railroad Company was paid in lieu of assessments for benefits, most of the contract is concerned with the plans and specifications for the construction of the viaduct, the city paid its $23,000 as the balance of the cost. None of these matters are attacked. No effort is made to fix the assessment for benefits in excess of $50,000. No effort is made to change the plans and specifications now. No effort is made to compel the Railway Company to repay the $23,000 to the city. The meaning and validity of the clause with respect to repairs is merely submitted to the court for determination. And the court really interprets that clause of the contract partly in favor of the city and partly in favor of the Railway Company.

On such a state of facts, what has this Court decided on the question of jurisdiction?

> "This Court does not obtain jurisdiction to review a judgment of a state court because that judgment impairs or fails to give effect to a contract. The state court must give effect to some subsequent statute or state constitution which impairs the obligation of the contract, and the judgment of that court must rest on the statute either expressly or by necessary implication."

*New Orleans Water Works Co. v. Louisiana,* 185 U. S., 336, 350-351.

In this case a joint resolution had been passed by the State Legislature referring certain reports affecting the rights of the Water Works Company "to the attorney general of the state for such action in the premises as he may deem proper." In commenting on this resolution, this Court says:

> "The joint resolution of the legislature of Louisiana referred the whole matter to the attorney general for him to bring suit to forfeit the charter or to take such action as he might think proper. It was a simple authority, if any were needed, to present the question to the court, and neither the contract nor any other rights of the parties were in any wise altered by such resolution." *Id.* 351.

In *Dawson v. Columbia Trust Co.,* 197 U. S., 178, we have a case where a mortgagee of a private water works company undertakes by a bill in equity to enjoin a municipality from building a new water works, and compel it to specifically perform a certain contract to pay water rents to the private company. The city had formally repudiated its contract, refused to pay the water rents, attempted to collect taxes that were, by the contract, to be satisfied by the furnishing of water, and had called and held an election to authorize an issue of bonds to build its own water works, and was threatening to sell the bonds for that purpose. The state court had held the contract void. Yet this court says, in its opinion in that case, p. 181:

"The bill presents a naked case of breach of contract. The first step of the city was to repudiate the contract and to refuse to pay. Whatever it may have done subsequently, its wrong, if, contrary to the decision of the Supreme Court of the State, there was a wrong, was complete then. The repudiation and refusal were kept up until the bill was filed and the other acts were subsequent, subordinate to and in aid of them. The mere fact that the city was a municipal corporation does not give to its refusal the character of a law impairing the obligation of contracts or deprive a citizen of property without due process of law."

This decision was based largely upon the decision in *St. Paul Gas Light Co. v. St. Paul*, 181 U. S., 142. In this case, the contract the obligations of which were asserted to be impaired was found in the franchise of the Gas Light Company. obligated the city to pay a certain rate of inter- The particular provision of the franchise in issue est on the cost of constructing certain street lamp posts ordered by the city to be constructed by the Company, and the city had so paid such interest for many years. On account of the substitution by the city of electric light for gas light in certain sections of the city, the city ordered the gas lamp posts removed in such sections and refused to pay the interest on the cost of constructing the same thereafter. This order for the removal of the gas posts and refusal to pay interest took the form of a resolution of the city council, which is set forth in full in the statement of the case. The Gas Light Company alleged that this reso-

lution in legal purview amounted to action by the State impairing the obligations of the contract embraced in its charter, and was hence void because repugnant to the constitution of the United States. This court, in its opinion, proposes this question as the controlling one to be decided, namely: Has there been state legislation impairing the contract obligations? The court then proceeds to analyze the council resolution, that being the only state legislation enacted, and says:

> "if the contract (franchise) imposed the obligation to make such payment (interest), the duty of the city to do so was left absolutely unaffected by the order to remove. That is to say, if the duty to pay was created by the contract, such obligation remained wholly untouched by the order of removal. This being true, it results that the order to remove the unused lamp posts cannot be treated as an impairment of the obligations of the contract without saying that such obligations were destroyed, although they were absolutely unaffected by the act which it is asserted brought about the impairment. And it will become at once manifest from a consideration of the remaining provision of the ordinance that the same result must follow. The other provision in question created no new right or imposed no new duty substantially antagonistic to the obligations of the contract, but simply expressed the purpose of the city not in the future to pay the interest on the cost of construction of the lamp posts which were ordered to be removed. That is to say, it was but a denial by the city of its obligation to pay, and a notice of its purpose

to challenge in the future the existence of the duty to make such payment. * * * When the substantial scope of this provision of the ordinance is thus clearly understood, it is seen that the contention here advanced of impairment of the obligations of the contract arising from this provision of the ordinance reduces itself at once to the proposition that wherever it is asserted on the one hand that a municipality is bound by a contract to perform a particular act and the municipality denies that it is liable under the contract to do so, thereby an impairment of the obligations of the contract arises in violation of the constitution of the United States. But this amounts only to the contention that every case involving a controversy concerning a municipal contract is one of Federal cognizance, determinable ultimately in this court. Thus to reduce the proposition to its ultimate conception is to demonstrate its error."

Counsel undertakes to distinguish this case by saying that this action could not be brought without the legislative determination of what repairs should be made. That may be true; but the jurisdiction of this court cannot be invoked because an action at law attacks the validity of a contract. There must be shown some law that impairs the obligation of the contract. Again, counsel claims that the fact that the city had power to itself repair the viaduct, in the absence of the ordinance the railway company would not be bound and indeed would be a trespasser had it attempted to make the repairs. It seems to us that the mere existence of the power could not

require its exercise by the city if the city should determine to exercise some other power it possessed to accomplish the same result. And if that power could not be exercised without a demand being made, and the only way a legal demand could be made would be by resolution of the common council, the mere making of such demand by such resolution would not take on the dignity of a legislative enactment.

Suppose we assume the contract of 1891 was unquestionably void as to the perpetual obligation of the city to keep the viaduct in repair. How could we get into court to raise the question except by the passage of a resolution containing all the provisions of the resolution under discussion? Is a city so different from an individual that when it goes into court to test the validity of a contract, jurisdictional rules are differently applied because it has to act through a common council? Is a public corporation so different from a private corporation that the latter need not face a jurisdictional question in the Federal Courts, if the action is authorized by a resolution of its board of directors, which the former must face if the action is authorized by resolution of its common council? As was said by this court in *Dawson vs. Columbia Trust Company, supra,* the mere fact that the city was a municipal corporation does not give to its refusal (or to its demand) the character of a law impairing the obligation of contracts.

If the resolution did mean all that counsel claims for it, still it is not a legislative enactment

which impairs, in the constitutional sense, the obligation of a contract. The resolution was passed by the council in the exercise of its police power to promote the public safety. If there be any doubt about that being the proper construction of it, it is not an open question in this court, for the state court has so construed it.

> "The constitutional prohibition upon state laws impairing the obligation of contracts does not restrict the power of the state to protect the public health, the public morals or the public safety, as the one or the other may be involved in the execution of such contracts. Rights and privileges arising from contracts with a state are subject to regulations for the protection of the public health, the public morals, and the public safety, in the same sense and to the same extent as are all contracts and all property, whether owned by natural persons or corporations."

*New Orleans Gas Co. vs. Louisiana Light Co.*, 115 U. S., 650, 672.

It is likewise thoroughly established in this court that the inhibitions of the Constitution of the United States upon the impairment of the obligation of contracts, or the deprivation of property without due process or of the equal protection of the laws, by the states, are not violated by the legitimate exercise of legislative power in securing the public safety, health and morals.

*New York & New England R. R. Co. vs. Bristol*, 151 U. S., 556, 567.

The constitutional provision does not apply to contracts made by parties dealing with a department of government concerning the future exercise of governmental power conferred by legislative acts, where the subject matter of the contract is one which affects the safety and welfare of the public.

*Board of Education vs. Phillips*, 67 Kan., 549.

*As to the merits.*

I.

The contention of plaintiff in error is, first, that upon the validity of an alleged contract this court follows the law of the state as it existed when the contract was made and will disregard later decisions to the contrary; and, secondly, that the decisions of the Minnesota court, at the time the contract of 1891 was made, were contrary to the decision in the case at bar.

Our answer is: (1) That the rule stated by counsel is limited to decisions of the state court as to the interpretation or validity of its own constitution and statute laws. It does not apply to the general law not found in written constitutions or statutes; (2) That the decisions of the state court, at the time the contract of 1891 was made, were not contrary to the decision in this case.

(1) The rule stated by counsel is limited to decisions of the state court as to the interpretation

or validity of its own constitution and statute laws, and does not apply to the general laws not found in written constitutions or statutes.

In every instance where the question has come before the Supreme Court of the United States in the exercise of appellate jurisdiction over the supreme court of a state, and in which the Federal Supreme Court was confined in the determination of the question to definite constitutional and legal principles, it has been held that a decision of a court interpreting a contractual statute or declaring the common law is not a law, within the provisions of the constitution of the United States. It is in this sense that the word "law" is used in the last sentence quoted by counsel on page 17 of his brief, from *Ohio Life Insurance and Trust Company vs. Debolt*, 16 How, 416, and in the cases there cited.

The courts of highest authority in all of the states, and of the United States, are not infrequently constrained to change their rulings upon questions of the highest importance. In so doing the doctrine is, not that the law is changed, but that the court was mistaken in its former decision, and that the law is, and really always was, as it is expounded in the later decision upon the subject. The members of the judiciary in no proper sense can be said to make or change the law. They simply expound and apply it to individual cases. To this general doctrine there is a well established exception, as follows:

> "After a *statute* has been settled by judicial construction, the construction be-

> comes, so far as contract rights acquired under it are concerned, as much a part of the statute as the text itself, and a change of decision is, to all intents and purposes, the same in its effect on contracts as an amendment of the law by means of a legislative enactment."
>
> *Douglas v. Pike County,* 101 U. S., 677.

This seems to be the only exception. As it is not, and cannot, be claimed that the decisions of the Minnesota Supreme Court prior to 1891 construed any constitutional provision or state statute which was construed in the decision in the case at bar, the rule is inapplicable. Indeed, the statute that was construed in the case at bar, namely, the charter of the railroad company, was construed for the first time by the Minnesota court in the decision now under consideration. In the absence, therefore, of any prior decision on the subject, there can of course be no claim upheld that the law was "settled" in 1891.

(2) The decisions of the state court, at the time the contract of 1891 was made, were not contrary to the decision in this case.

Our view is that these decisions held that without respect to the question of priority of occupancy, if the highway crossing was to be made merely fit for travel, the obligation to pay the expense therefor was not upon the railway company; but if the highway crossing was to be made safe for travel, the obligation to pay the expense therefor was upon the railway company. The application of the law therefore depended, in each case, upon the particular thing required by

the city to be done by the railway company. Was the thing required to be done a safety device? If so the railway company must do it at its own expense. For such a requirement is an exercise of the police power, and compliance therewith is an uncompensated duty of the railway company.

The Minnesota court held, on the facts in the case at bar, that the viaduct is a safety device. It is not claimed that that portion of the decision is contrary to any prior decision of this court.

Counsel calls attention to only two cases in the state court, prior to the making of the contract of 1891, which had "settled the law" contrary to the decision of the present case. These are *State ex rel. City of Minneapolis vs. St. Paul, Minneapolis & Manitoba Railway Company,* 35 Minn. 131 and *State ex. rel. vs. St. Paul, Minneapolis & Manitoba Railway Company vs. District Court,* 42 *Minn.,* 247.

The case in the 35th involved a different charter than the one under consideration here. The facts disclosed a case in which the street existed before the railroad was constructed, which is not this case. The only thing in the opinion of the court, which can by any reasonable construction be considered as supporting plaintiff's contention, is found in the final paragraph of a nine-page decision, and it will be recognized at once as *obiter.* As is said by the state court in deciding the case at bar, (referring to this part of the opinion in the 35th) "the remark was made for the purpose of indicating that the decision was intended to be limited to existing streets only."

And this remark was limited to what was said regarding the construction of the *statute*. The statement made by the court of the common law rule is not expressly or impliedly included. Nor does the court say that the statute was merely declaratory of the common law. It bases its decision strictly on the statute, but finds the reason for it in the common law. It says the common law rule is that "this duty is founded upon the equitable principle that it was their act, done in pursuit of their own advantage, which rendered this work necessary, and therefore they, and not the public, should be burdened with its expense." In the case at bar, it was the act of the railway company in increasing the number of its tracks, and the number and frequency of its trains across Lake Avenue, in pursuit of its own advantage in moving its trains and avoiding accidents, which rendered the viaduct necessary, and therefore the railway company and not the city should be burdened with the expense. This is a proposition the relator has relied on in this case from the beginning, and it is absurd to say that the case in the 35th settled the law of the state, at the time the contract of 1891 was made, contrary to what was held by the court in the case at bar.

The case in the 42nd is an appeal by the railway company in proceedings for laying out a street across its right-of-way, involving certain items of damages which should be awarded the railway company. It was a case where the railroad antedated the highway. The items of damages covered planking, cattle-guards and sign-boards. The court says:

"For the present we will confine our attention to the cattle-guards and sign-board. The necessity for these arises from the dangerous nature of the use of the railroad property; and it cannot now be questioned that, as a matter of mere police regulation, the state has the power to impose upon railroad companies the duty of maintaining these safeguards. There can be no doubt that, if no such requirement had ever been embraced in our general laws or in the charters of railroad corporations, and if all our railroads had been constructed without such devices for lessening the dangers incident to railroad operations, it would be within the police power of the legislature to require all railroad companies to provide such safeguards at all existing railway crossings. It has been decided in this court that the police power of the state authorized such requirements as to the construction of cattle-guards and fences. *Gillam v. Sioux City & St. Paul R. Co.*, 26 Minn., 268 (3 N. W. Rep. 353); *Winona & St. Peter R. Co. v. Waldron*, 11 Minn., 392, (515). It is but an exercise of the everywhere recognized police power of the state, regulating by reasonable and necessary means the use of instrumentalities otherwise attended with obvious and great danger to the public. No other principle is involved in such requirements than is involved in imposing a reasonable limitation upon the speed of railway trains at street crossings, and within the limits of thickly populated municipal districts, or in requiring a bell to be rung or whistle blown at highway crossings, or the stoppage of trains at railway crossings, and in other like provisions which are found in the statutes of every state. Such statutory

regulation of the use of property does not constitute a taking of the property, or its destruction. It is only the exercise of the power of the state to reasonably control the use of property and the conduct of the individual, so far as may be necessary for the public safety; and to such control every citizen and owner of property must submit without compensation.

If the legislature, then, could constitutionally, and without providing for compensation, have imposed this duty in the case supposed, after the railroad had been constructed and put in operation, by enacting a law requiring railroad companies to construct cattle-guards across their right of way, and to erect sign-boards to notify travellers of the existence of the railroad crossing, it will be found difficult to assign a reason in support of the relator's claim for compensation in this case. Although this street was not in existence when the railroad was constructed, and hence the requirement of the general law did not impose the duty of putting in cattle-guards and sign-boards at this place at that time, yet, as soon as the street was laid out and opened, the already existing law became applicable, and required these things to be done. But this was an exercise of the police power, as in the case before supposed. The circumstances with reference to which the general police regulation, embodied in the general law, had been framed, have now come to exist in respect to this particular locality, and the requirements of that law have become operative. There was no implied contract between the state and this corporation, when it became incorporated, that it should only be required to put in and maintain these safe-

guards at the crossings of streets then laid out, or at such as might be laid out prior to the construction of the railroad. The fact that not until after the construction of the railroad has the situation at this place come to be such as to require any protection from the dangers incident to railroad operation has very little bearing upon the case, if as we think is self-evident, the statutory requirement to which the corporation is subjected is merely a reasonable police regulation of its business, and not a taking or destruction of its property. When the railroad company accepted its charter, it received its franchises subject to the authority and power of the state to impose such reasonable regulations concerning the use, in matters affecting the common safety, of its dangerous enginery, and not merely subject to the then existing regulations as applicable to then existing conditions; and whether the obligation now in question had been imposed at this time by direct act of the legislature, or, as is the case, arises from the laying out of a new highway, to which the previously existing law becomes applicable, can make no difference.

The fallacy involved in the claim of the relator, and, as we think, in some decisions by which its claim is supported, arises from a failure to distinguish between rights of property, which confessedly are protected under the constitution from being divested or appropriated to other purposes without compensation, and the very different matter concerning the manner in which the owner may use his property so as not to unnecessarily endanger the public. The claim of the relator involves an assumption that when the railroad constructed its line of road, conform-

ing to the requirements of the law as to all then existing highway crossings, it had a constitutional right, by virtue of its priority, to always afterwards operate its road unembarrassed by being required to observe like precautions with respect to highways that might be thereafter laid out across the railroad, except upon the condition that it should receive compensation, not merely for whatever of its acquired property might be taken for the other use, but also for the expense and burden of conforming its own conduct to the newly-existing conditions—of conforming to a general police regulation of the state, not before applicable. There was no such exclusive or superior right acquired by priority of charter, or of the construction of this railroad highway. It cannot be supposed that, when its franchises were granted to this relator to construct and operate this railroad, it was contemplated, either by it or by the state, that no more public highways should be laid out which should increase the number of places where the ordinary police regulations would have to be complied with by the railroad company to its inconvenience and expense. On the contrary, it must have been understood and contemplated, especially in a new state rapidly advancing in population and in the development of its resources, where new towns were springing up, and new avenues for travel and traffic were becoming necessary, that new streets and roads would be and must be laid out, and that many of these would necessarily cross existing railroad lines. We cannot resist the conclusion that, so far as concerns the matter now under consideration, the charter of the relator was taken subject to the right of the state to im-

pose this duty whenever, by reason of the establishing of new highways, it should become necessary; and hence the relator is not entitled to compensation for obedience to this requirement. *Lake Shore, etc., Ry. Co. v. Cincinnati, etc., Ry. Co.,* 30 Ohio St. 604; *Chicago & Alton R. Co. v. Joliet, etc., R. Co.,* 105 Ill., 388, 400, 404; *City of Hannibal v. Hannibal & St. Joseph R. Co.,* 49 Mo., 480; City *of Bridgeport v. New York & New Haven R. Co.,* 36 Conn., 255."

The portion o fthe opinion quoted in plaintiff's brief, in reference to "planking", is based partly on the reason therein given, and partly on an Illinois case. The reason is that planking is part of the work of constructing the highway and making it fit for travel, and not in any sense pursuant to a police regulation. Under the portion of the opinion we have quoted above, it will be apparent that if the court had considered the planking a safety device, it would have required the railway company to do it without compensation. The Illinois case, cited as authority for the holding that was made, was overruled, as to the doctrine it was cited to support, by the court that rendered it some time before the Minnesota court cited it in the 42nd. *Illinois Central R. Co. vs. Willenberg,* 117 Ill., 203.

Consequently, the relator relied on the decision in the 42nd as Minnesota authority for its position on the duty of the railroad company to yield uncompensated obedience to the police power of the state, on the theory that all the city had to do to bring this case strictly within the author-

ity of the 42nd was to convince the court that the viaduct was a safety device, and therefore in the class with cattle-guards and sign-boards instead of planking. Whatever this court may think of the effect of this decision, it will hardly say that it "settled" the law contrary to the decision in the case at bar.

As these two cases in the 35th and 42nd are the only ones decided on this general subject by the Minnesota Court prior to the making of the contract of 1891, the question as to what was settled law in Minnesota at the time the contract was made must be answered without consideration of any subsequent cases. And from a consideration of these two cases we contend that, contrary to the law being settled against the decision in the case at bar, it was settled, if at all, in accordance with it, except on the one question of whether the Lake Avenue viaduct was a safety device. Certainly as to sign-boards and cattle-guards, the law was settled that as to such safety devices they should be furnished and maintained by the railway company at its own expense, and the court having now held the viaduct to be a safety device, the principle involved is as much settled as to viaducts as it was in 1891 as to sign-boards and cattle-guards.

The other cases discussed by counsel on this branch of his argument, not having been decided prior to the making of the contract of 1891, are not available in an attempt to apply the doctrine "that upon the validity of an alleged contract this court follows the law of the state as it existed when the contract was consummated."

## II.

Counsel further contends that even if the law on this question was doubtful or unsettled in 1891, it was a fair subject of compromise, and that the contract of 1891 was entered into as a compromise agreement, was based upon valuable considerations moving to each party, and therefore valid.

Counsel says the parties, before the contract was made, had before them several doubtful questions, each of which might become the subject of litigation, and refers to three: The priority of occupancy of the *locus in quo*, the obligation of the railway company to build if it was first on the ground, and the necessity and dimensions of the viaduct. The record does not show that any of these matters were in dispute between the parties at the time the contract was made. The finding (Trans. p. 89) is that after the plans had been prepared and demand to build made upon the Railway Company, "considerable negotiation ensued. The Railroad Company refused to build the viaduct, disputed its obligation so to do, but later on said contract Exhibit A attached to Respondent's answer herein, was entered into." That is all. A dispute of the obligation in the most general terms. No dispute, however, on the ground of priority of occupancy. But by inspection of the contract (Trans. p. 19), it appears that the payment of the $50,000 by the Railway Company to the City (which was the only consideration moving from the Railway Company), is said to be "in lieu and stead of all assessments for benefits in excess of

damages for the taking of property of the party of the second part, to be caused by said public improvement, which might be imposed upon the property of the party of the second part as prescribed by law." So it appears that instead of the Railway Company even claiming to pay a consideration to compromise any dispute as to the right of the City to exercise its police power, it was claimed to have been paid in lieu of assessments which the city was supposed to have a right to make for benefits accruing to the Railway Company by reason of the construction of the viaduct.

A compromise is a contract. If a compromise is made, by the terms of which a municipality forever surenders its police power, it is nothing more nor less than contracting away its police power, and because a city may have the right to compromise matters within the domain of its proprietary functions it does not follow that it also has the right to compromise matters within the domain of its governmental functions.

Whether the contract of 1891 was a compromise or not, the law with respect to the authority or power of the city to make it is the same. It was an attempt on the part of the city to bind itself to keep the viaduct in repair forever. It was made at a time when, under the decision in this case, the common law and the charter of the Railroad Company imposed that duty on the Railroad Company. The State had also delegated power to the City, under its then-existing charter, "to require railroad companies to construct at their own expense such bridges as the common council may

deem necessary." The council had taken the necessary action to exercise that power. The question, therefore, is: Was the Railroad Company at that time bound to build the viaduct and keep it in repair at its own expense?

As was said by the trial court, in its memorandum:

> "The question after a long lapse of years is not whether the street was there a month or a day before the railroad, or whether the railroad was there a month or a day before the street; the question is whether a condition of affairs exists whereby the public safety is endangered, and whether that condition has been created by the Railway Company in the prosecution of its enterprise for the attainment of its own ends. The Railway Company was and is at all times subject to the exercise of the police power by the city. It accepted its charter and began its operation with that understanding. Wholly irrespective of the question of priority here invoked the Railway Company is bound to do whatever may reasonably be required by the city in the exercise of that power. This is clearly laid down in State ex rel vs. District Court of Hennepin County, 42 Minn., 247, and in what seems to me to be many of the best considered cases throughout the country, including N. Y. & N. E. R. R. Co. vs. Bristol, 151 U. S., 556. Compelling a railway company to bridge a dangerous crossing is, of course, nothing more than an exercise of the police power and is everywhere so considered. It is so considered in the present charter of the City of Duluth and was likewise considered in the preceding charter which was

in force when the viaduct in question was constructed. No justification is apparent for holding that these legislative concepts of police regulations are unconstitutional, and, unless so held, they are binding. The fact that a railroad has first traversed the country is not such a pre-emption of opportunity as will serve to forestall the exercise of the police power. Roads and streets may still be laid out as before, and if in so doing a line of railway is crossed which in the course of time becomes dangerous to the public safety it may become the duty of the railway company to remove the danger by bridge or tunnel; for 'this duty is founded upon the equitable principle that it was their act done in the pursuit of their own advantage which rendered this work necessary, and therefore they, and not the public, should be burdened with its expense,' (State ex rel vs. St. P. M. & M. Ry. Co., 35 Minn., 131-133; State ex rel vs. Minnesota Transfer Ry. Co., 80 Minn., 114), and, logically, the application of this principle has no concern or connection with the question of priority here urged and considered. On principle it would seem that the only question is whether the safety of the public is endangered at a place where it has a right to be and whether such danger has been occasioned by the prosecution of the railway enterprise. If this be correct, the chance circumstance of which happened to be there first years ago—the railroad or the street—when neither one interfered in any substantial degree with the use of the other is of little concern. * * * The viaduct here in question being necessary to serve the public safety it was, in my opinion, the duty of the Railway Company to construct it, and that irrespective of the question of priority hereinbefore discussed."

If the duty, then, rested upon the Railway Company to construct the viaduct, was the contract of 1891 a valid one, and is the Railway Company now relieved from the duty of making the needed repairs, at its own expense?

In *State ex rel. St. Paul vs. Minnesota Transfer Railway Company*, 80 Minn., 108, the court says, in the syllabus:

> "Where the duty rests upon a railway corporation to restore a public way to its former condition of usefulness, a muncipality cannot enter into a valid contract with such corporation whereby it surrenders its power to compel the performance of such duty. It cannot contract with such corporation that it will 'maintain' a certain bridge, to be erected by either or both parties, 'for all future time.' Such an agreement on the part of a municipality is beyond the power of municipal officers, is contrary to public policy, and of no effect. It is a general and fundamental principle of law that all persons contracting with a municipal corporation must, at their peril, inquire into the power of the corporation or its officers to make a contract. A municipality is not estopped in such a case to assert the invalidity of the contract by the fact that a bridge has been built by both parties, as the result of a compromise between the municipal authorities and the railway officials, and has thereafter been kept in repair by the municipality for a number of years."

In *New York & New England R. R. Co. vs. Bristol*, 151 U. S., 556, this Court says, on page 567:

> "The governmental power of self protection cannot be contracted away, nor can the exercise of rights granted nor the use of property be withdrawn from the implied liability to governmental regulation in particulars essential to the preservation of the community from injury."

See also cases cited by the court in the Minneapolis case upon which the decision in the case at bar was based.

The authorities cited by plaintiff in error on the validity of compromise contracts are cases where private persons, dealing with matters and things in which the public has no concern, attacked the validity of the compromise. This is not our case.

> "Where, however, the respective parties are not private persons, dealing with matters and things in which the public has no concern, but are persons or corporations whose rights and powers were created for public purposes, by legislative acts, and where the subject matter of the contract is one which affects the safety and welfare of the public, other principles apply. Contracts of the latter description are held to be within the supervising power and control of the legislature when exercised to protect the public safety, health and morals, and that clause of the Federal Constitution which protects contracts from legislative ac-

tion cannot in every case be successfully invoked. The presumption is that when such contracts are entered into it is with the knowledge that parties cannot, by making agreements on subjects involving the rights of the public, withdraw such subjects from the police power of the legislature. * * * We think that, in view of the paramount duty of the legislature to secure the safety of the community at an important crossing within a populous city, it was and is within its power to supervise, control and change such agreements as may be, from time to time, entered into between the city and the railroad company, in respect to such crossings, saving any rights previously vested."

*Chicago B. & Q. R. Co. v. Nebraska,* 170 U. S., 57, 72-74.

See *Chicago B & Q. R. Co. v. Illinois,* 200 U. S., 561.

A municipality contracts away its police power when it contracts away the right to say who shall pay for compliance with an exercise of the police power. It is *uncompensated* compliance with the requirements of governmental authority to preserve the safety of crossings that the law requires.

*State ex rel. Minneapolis v. St. Paul, M. & M. Ry. Co.,* 35 Minn., 131.

*New York & N E. R. Co. v. Bristol,* 151 U. S. 556, 571.

*Chicago B & Q. R. Co. v. Chicago,* 166 U. S., 226, 254.

*New Orleans Gaslight Co. v. Drainage Commission,* 197 U. S., 453.

*Boston & Maine R. Co. v. County Commissioners*, 79 Me., 386.

While we are not abashed by the attempt of counsel to classify the relator, and other cities that have been forced to appeal to the courts under like circumstances, with lunatics and infants, it seems to us that the court should not approach the question of declaring this contract void, with any reluctance or feeling of bad faith on the part of the city. If it was the duty of the railroad company to build this viaduct and keep it in repair at its own expense, its exaction from the city of approximately one-third of the total cost of the original structure, and the obligation to make repairs to the approaches forever and to the viaduct proper for fifteen years, was an unconscionable bargain driven by the railroad company at a time when the lives of many people were being jeopardized by every day's delay in the construction of the viaduct. When a railroad company, under such circumstances, takes advantage of the necessities of a municipality, the court should not look with disfavor on an effort by the municipality to restore the rightful status of the parties, and recover for the public the protection it had been despoiled of, when the opportunity afterwards presents itself.

BERT FESLER.